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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1678

MITZI S. BRIGGS,
Appellant,

vs.

STATE OF CALIFORNIA, etc.,
Appellee

Appeal from the Court of Appeal of California
First Appellate District, Division Two

JURISDICTIONAL STATEMENT

JESS S. JACKSON
180 Park Road
Burlingame, California 94010

GIDEON KANNER
1440 West Ninth Street
Los Angeles, California 90015
Attorneys for Appellant

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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JURISDICTIONAL STATEMENT

THE OPINION BELOW

The Opinion of the California Court of Appeal, First Appellate District, Division Two, is reported at 98 Cal. App.3d 190, 159 Cal.Rptr. 390.

JURISDICTION

1. This is a civil action in inverse condemnation brought by Appellant, Mrs. Mitzi S. Briggs, against the State of California, to recover just compensation for the *de facto* taking of her land for a state beach park and open space.

The cause was fully tried as to all issues on the merits. The trial court, sitting as a trier of fact without a jury heard evidence of *de facto* taking and precondemnation loss liability and thereupon made detailed and extensive findings of fact (Appendix E), determining that the state *totally* deprived Appellant of *all* her property rights in her land, and concluded that a *de facto* taking thereof occurred in March 1975 (Appendix F). Thereupon valuation was tried before a jury which awarded just compensation to which the trial court added compensation for pre-taking losses for inequitable precondemnation takings of all use and return, delay losses and attorneys' fees pursuant to a California statute.

On appeal, the California Court of Appeal reversed, holding that notwithstanding these findings, a taking of property did not occur as a matter of law, because the various State acts (starting in 1972 and found culminating in a full fee taking in March 1975) that *de facto* stripped Appellant of her property all occurred before the State Board of Public Works passed a resolution approving the acquisition of the subject property on September 27, 1976, and hence as a matter of law the State could not *de facto* "take" Appellant's property *no matter what it actually did and regardless of the total economic effect accomplished and intended.*

Additionally, the appellate court below held that as a matter of law Appellant could not recover just compensation for the *de facto* taking *in March 1975,* because her asserted sole remedy, despite the fact the State's intended taking accomplished total nonuse, was the pursuit of a writ of mandate seeking to invalidate the State's denials in

June and August, 1973 of permits necessary to use her land. The latter ruling was made on the authority of *Agins v. City of Tiburon,* 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), probable jurisdiction noted, January 7, 1980, now pending before this Court as No. 79-602.*

2. The judgment of the California Court of Appeal was rendered on October 30, 1979. A timely petition for rehearing was denied on November 29, 1979, concurrently with modification of the opinion (the modified opinion appears in Appendix A). A timely petition for hearing was filed in the California Supreme Court. That Court extended the time in which to act on the Petition, and eventually denied it on January 24, 1980. A timely notice of Appeal to this Court was filed on March 20, 1980.

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*The appellate court inappropriately held *Agins* was controlling and totally ignored extensive trial court findings of fact that the "regulatory" acts in this case in large part were inspired by State motives to implement the public condemnation and use of Appellant's land. Alone and together with the State's precondemnation acts and delays they totally deprived Appellant of her property.

As contrasted to *Agins,* heard at oral argument, April 15, 1980, the Constitutional Fifth and Fourteenth Amendment issues are sharply and unequivocally presented to this Court in this case. This is not a pleading case, for all issues went to trial, uncontested evidence of no viable use, return, market and value was presented; trial court (liability and compensation for pretaking losses) decisions and jury (fee taking compensation) verdicts were rendered; Findings of Fact, Conclusions of Law and Judgment were entered. In *Agins,* the California courts precluded trial (by demurrer, the state equivalent of federal dismissal for failure to allege a claim). In this case Appellant did fully exhaust her "administrative" remedies (despite their total futility and idleness—considering that the State has continued its unrelenting course to acquire this property for public park use). In this case the State's acquisitory condemnation activity *still continues* and the State's tardy direct condemnation action was (and is) yet pending (e.g. see Finding of Fact 44(e), Exhibit E, p. A-42).

3. Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1257(2).

Cases sustaining jurisdiction of this Court to review by appeal state court judgments concerning takings of private property without just compensation are:

Lake Country Estates Inc. v. Tahoe Regional Planning Agency, 436 U.S. 943 (1979);

Kaiser Aetna v. United States, ... U.S. ....., 100 S.Ct. 383 (1979);

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978);

Moore v. City of East Cleveland, 431 U.S. 494 (1977);

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977);

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Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926);

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use, without just compensation,"

Fourteenth Amendment, United States Constitution:

"SECTION 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The pertinent provisions of the California Property Acquisition Law on which the court below relied, as against Appellant's constitutional argument, California Government Code Sections 15850 et seq. These statutes appear in Appendix G.

The pertinent provisions of the California Coastal Zone Conservation Act of 1972 ("Proposition 20") adopted by initiative and legislatively amended in 1974, were the primary basis for the State's purported "regulatory" acts; see former California Public Resources Code Sections 27000 et seq.

QUESTIONS PRESENTED

1. Is it constitutionally permissible for a state court to hold unqualifiedly that payment of monetary just compensation provided by the Fifth and Fourteenth Amendments is *never* available as relief to an owner for total economic deprivation of property (loss of all use, return, market and value) caused by:

A. Regulations not motivated* or applied to the property to facilitate condemnation purposes?[1]

B. Regulations motivated or applied to the property not to further public health, safety and welfare but to facilitate condemnation purposes?

C. Inequitable precondemnation activities to abet public formal condemnation unreasonably delayed?

D. Regulations not motivated* or applied to the property to facilitate condemnation purposes but combined with inequitable precondemnation activities to abet public formal condemnation unreasonably delayed?

E. Regulations motivated or applied to the property not to further public health, safety and welfare but to facilitate condemnation purposes, and combined with inequitable precondemnation activities to abet public formal condemnation unreasonably delayed?

2. Where *regulatory* State activity preventing use of the subject property, *combined* with repeatedly announced and widely publicized State plans to condemn such ostensibly regulated[2] property for a state park, combined with other *precondemnation activity*, restraints and extensive *delay* in its filing of a formal condemnation action, separately substantially, and together totally cause and effect a *complete* destruction of that property's utility, return, marketability and value, leaving nothing in the nominal owner save only her obligation to continue paying property taxes on her now useless land:

A. has a taking of property occurred, within the meaning of the Fifth and Fourteenth Amendments, so as to entitle such owner to monetary just compensation?

B. It is constitutionally permissible for a State Court to declare under such precondemnation acts and effects that as a matter of law just compensation is never recoverable, no matter what the State actually does, and that the aggrieved owner may only seek the noncompensating *"remedy"* of judicial invalidation of the ostensible regulation, even though such regulation would not and could not *undo* said owners past losses, would be *futile* to prevent the State's condemnation and blight, and constituted only one substantial factor in the *de facto* taking effected by the combined, cumulative and intended impact of a host of State precondemnation activities?[3]

*This question *assumes* such regulation was purely motivated for valid public goals, i.e. valid land use concerns, as apparently assumed by the appellate court below, and not, as *found* by the trial court, applied as a device to aid condemnation by preserving the property in open space for public benefit pending condemnation at depressed values.

[1]This question is now pending before this Court on the merits in *Agins v. City of Tiburon*, No. 79-602.

[2]The regulation is properly characterized as ostensible because the trial court found on ample evidence that the State's denial of the permits necessary for Appellant's use of her land was ". . . pursuant to a policy to preserve the subject property in its then undeveloped status pending its acquisition." (Finding 56; see Appendix E, p. A-44).

[3]Please consider this Question in conjunction with Question 4, *infra*.

3. Where on a fully developed trial record containing a wealth of undisputed evidence, a trial court sitting as a trier of fact found *expressly* that State regulatory activities combined with simultaneous, avowed, widely publicized State plans and *precondemnation activities* aimed at public acquisition of the subject property, individually and together so impacted on that property as to preclude all viable economic use, return, sale and value, and have caused the owner to incur substantial losses and substantial delay in payment of just compensation, and where the *"regulatory" activities* were undertaken pursuant to a State *policy to preserve* the subject property in its open space undeveloped status pending its acquisition by the State:

A. Is such impact on the subject property (and the State's acts and policy in so acting) determinative of the question whether a taking within meaning of the Fifth and Fourteenth Amendments has occurred?

B. Is it constitutionally permissible for a State court to rule that such State activities and their impact on the subject property's value, utility and marketability may be wholly disregarded, and that notwithstanding these *factual* events, no taking occurred as a matter of law, because of the State's delay in following its own internal procedure whereby the State Board of Public Works is supposed to formally adopt an authorizing *resolution* before private land may be acquired for state parks, which here the Board delayed doing for an extended (and to an owner unreasonable) period of time?

4. Where a trial court found that a *de facto* taking (consisting of deprivation of *all* value, utility and marketability of the subject property) was effected by a continuous and extended course of governmental activity spanning a period of several years, but the course of governmental conduct included (as only one factor) the denial of a land use permit some 1½ years before the governmental activity became cumulatively so onerous as to give rise to a *de facto* taking, is it constitutionally permissible for a State court to rule that the aggrieved owner's sole "remedy" for such *de facto* taking is to have sued for non-monetary relief from the permit denial, some 1½ years before the *de facto* taking cause of action even *accrued* and particularly in the face of State legislative policy, declarations and assurances making such non-monetary "relief" an idle, wasteful and futile process?

5. Is it constitutionally permissible for a State court to hold unqualifiedly that the *only* remedy available to a landowner whose property has been *de facto* taken by the combined effect of numerous State activities (which included *as only one factor* the denial of a land use permit) is to seek *non-monetary relief* in the form of a writ of mandate invalidating the permit denial, even though such "relief" even if obtainable would be *wholly futile,* because the State thereupon could (*as it did here*) file an eminent domain action, thereby rendering such possible "relief" an idle act, and even though such "relief" could not undo the owner's losses?

6. On the facts at bench, where the trial court sitting as a trier of fact found on overwhelming and undisputed evidence that the subject property was completely *de facto*

taken by total deprivation of its utility, value, return and marketability, in pursuit of the State's policy to preserve the subject property as vacant land pending its eventual formal acquisition by the State, does the constitutional policy of fairness require that the ensuing economic burden of losses of return, value and of the property itself be borne by the benefitted public as a whole and not be disproportionately placed on such property's owner?

RAISING THE FEDERAL QUESTION

Appellant's complaint expressly alleged a taking of her private property for public use without just compensation, and deprivation of her property without due process of law, in violation of the Fifth and Fourteenth Amendments. The federal question was thus raised at the earliest possible time, and has been maintained throughout.

SPECIAL REQUEST FOR RELIEF

Aside from the important substantive issues of this controversy that amply warrant consideration on the merits, there is presented here an extraordinary situation. This case was disposed of below on the authority of *Agins v. City of Tiburon,* 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979) which is now pending before this Court.[4] Thus, should this Court eventually decide to reverse *Agins,* the legal rationale for the decision below will have been destroyed. Under such circumstances, it would be a needless

[4]*Agins v. City of Tiburon,* No. 79-602, probable jurisdiction noted, January 7, 1980.

and cruel miscarriage of justice for Appellant to suffer a loss on the supposed authority of the reversed state court decision.

Accordingly, the instant case amply warrants reversal and reinstatement of the trial court's judgment if this Court reverses *Agins,*[5] and as such warrants being held by the Court until such time as *Agins* is decided. Then, should the Court upon mature consideration decide to reverse *Agins,* the instant case could be disposed of summarily on the authority of this Court's decision in *Agins.* Thereby, Appellant would receive justified relief without further imposition on this Court's time and resources. Such a disposition would be both just and efficient.

However, should this Court not reverse *Agins,* this case also squarely presents distinct and additional constitutional issues. The facts and issues of this case go beyond the alleged total nonuse resulting from downzoning for public open space (and denial of fair hearing) raised in *Agins.* This case presents important constitutional issues concerning the misuses by a condemning agency of land use regulations with both interim and permanent confiscatory effects which cannot be undone. This case as well, raises questions as to inequitable precondemnation activities which totally strip an owner of all property rights.

[5]The Court's attention is invited to the fact that there is already before it another such case. A jurisdictional statement was filed at about the same time as *Agins,* in *San Diego G. & E. Co. v. City of San Diego,* No. 79-678, and the Court has not yet ruled on probable jurisdiction therein. *San Diego G. & E.* was also decided below on the authority of *Agins.*

STATEMENT OF THE FACTS OF THE CASE

Mrs. Mitzi S. Briggs (hereafter Appellant), acquired a vacant 35-acre oceanfront parcel of land between Point Lobos and Carmel, California, in 1963, intending to improve it with three homes to be integrated later into an executive-type resort and hotel. She had a $5,000,000 loan from Wells Fargo Bank, which was to be repaid from the proceeds. Appellant's efforts to implement her project began in 1968 when the three homes were designed; she obtained the necessary permits from Monterey County (in which the subject property is located) in October 1972. However, in the November 1972 election, a new law was adopted by initiative, creating a system of Coastal Commissions charged with development of a statewide coastal plan for land uses in the California Coastal Zone.[6] A misapplied, this "regulatory" act is one of the focal points of this action. The subject property lies in that zone and thus came within Commission jurisdiction.[7]

In early 1973, Appellant applied for a development permit, and for an exemption of her construction from the permit requirement. Her permit application received favorable recommendation from the Regional Commission staff which, *after initial consultation with the State De-*

[6]Please note that as of this writing—some eight years later—no such plan has been finally adopted. Also note one key function of said act was to recommend public acquisition of key parcels, including those (like the subject property) already planned for State acquisition.

[7]The Commission system is a two-tiered one. Applications for land use permits (required in addition to any local, city or county permits and zoning compliance) are made to Regional Commissions whose decisions may be appealed (by virtually anyone) to a single statewide Commission. The latter's appellate function is by a strange procedure deemed to be a *de novo* determination, even though the statewide Commission does not consider *de novo* evidence, and usually disposes of appeals in a matter of a few minutes.

partment of Parks and Recreation (hereafter Parks Department) executed a "Summary Report Form Permit" recommending issuance of the permit.[8]

However, one member of the Regional Commission took it upon herself to act dehors her office to frustrate Appellant's efforts. A few days before the Commission hearing on Appellant's permit, the Commissioner (Mrs. Gibson) telephoned the Director of the State Parks Department (Mr. Mott). As a result of this furtive, *ex parte* conversation Mott sent an *ex parte* telegram to the Commission. The telegram arrived at the Regional Commission on the eve of the hearing on Appellant's permit, and it was instrumental in cancellation of that hearing without notice to Appellant. Eventually, the telegram, as well as other Parks Department communications, were instrumental in the Commission's denial of the permit, for the "single and sole reason" (Finding 16, Appendix E, p. A-32) that the State "expressed an interest in acquiring the subject property." During the pertinent period of time (1973), denial was the fate of *all* development permits for properties on the State's acquisition list, i.e., whenever the State Department of Parks and Recreation showed an acquisitory "interest" in private land.

Altogether, there were four additional *ex parte* communications between the Commission and Parks Department personnel (one by letter and three by telephone)

[8]This document determined that Appellant's proposed land use (1) conformed to zoning; (2) would not have any substantial adverse environmental or ecological effect; (3) was consistent with the Coastal Act objective; (4) would have no significant effect on the environment; and (5) would not require a two-thirds Commission vote for approval because construction of three residences would have little effect on the area (Finding 8, Appendix E, p. A-29).

without notice to Appellant, all of which centered on the Department's desire to acquire the subject property and to keep Appellant from using it in the interim. As found by the trial court, such activities caused the denial of Appellant's permit in order to keep the subject property as "open space" until the State got around to condemning it (Finding 56, Appendix E, p. A-44).

Appellant then exhausted her administrative remedies by appealing the permit denial to the State Coastal Commission. Here again, the Parks Department made clear its intention to acquire the subject property[9] and, as found by the trial court, the appeal was denied substantially for that reason (Finding 25, Appendix E, p. A-34) even though other reasons were cited.

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[9]Much of the State's presentation below consisted of a semantic argument whereby it sought to distinguish between "intentions" and "plans". That argument consisted of asserting that the State can have no "intent" to acquire private property until it passes a formal resolution to that effect, and until this formality is attended to (which, of course, can be and in the case at bench was unilaterally withheld and delayed), there can be no "intent" to acquire, and so—goes the argument—no matter what the State actually does and no matter how it totally deprives a landowner of her property, there can be no taking because there was no formalized "intent" to take.

The trial court rejected this argument, but the California Court of Appeal accepted it, stating that "as a matter of law no action by the [Parks] Department alone could give rise to inverse condemnation liability" (Appendix A, p. A-20). In other words, what is before this Court for review is a holding that a State agency can *de facto* take private property without compensation (i.e., deprive its (former) owner of *all* rights and benefits of property ownership) but not be required to pay the *constitutionally* mandated just compensation because of the simple expedient of refraining from an internal controlled act of passing a resolution. This despite public officers repeated announcements and assurances of the state's intent to take, and specific public approval of the acquisition (the voters passed a bond issue allocating funds for purchase of the subject property, the legislature of the State appropriated these funds specifically for acquisition of this property and the Governor approved same).

Since the State's acquistory plans for the subject property were clear, undisputed and formed the clear basis for denial of Appellant's permit, any further pursuit of efforts to develop the subject property would have been an exercise in futility, because the State could at any time (*as it eventually did*) file a formal condemnation action, thereby rendering any judicial proceedings for non-monetary relief or new development plans wholly moot. The trial court accordingly found: "Since the State intended to acquire the subject property for public use, further attempts to privately develop the subject property would have been an idle act" (Finding 26, Appendix E, p. A-34).[10]

Appellant's decision not to pursue development of her land further was not only based on the evident futility of such a course in light of the State's imminent but tardy direct condemnation (which eventually did materialize), but also rested on repeated assurances given by State officials that her land would be expeditiously acquired. These included a letter from the Lieutenant Governor in

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[10]Please note that the doctrine of exhaustion of remedies is in California (as elsewhere) subject to the settled qualification that no one is required to pursue an idle endeavor (see *Ogo Associates v. City of Torrance* (1974), 37 Cal.App.3d 830, 112 Cal.Rptr. 761, and furthermore, in California such a determination of futility is deemed to be an issue of fact for the trial court (*People v. Superior Court (Tidwell)* (1979), 91 Cal.App.3d 95, 154 Cal.Rptr. 54, and see *Dahl v. City of Palo Alto*, 372 F.Supp. 647, 649. (N.D. Cal. 1974). Nonetheless, in spite of this record, the Court of Appeal completely disregarded the trial court's express finding and without any analysis of precedent or record whatever, asserted that Appellant's argument on this point was "spurious" (Appendix A, p. A-15). This curt, epithetical disposition of this important point was evidently based on the premise that under *Agins v. City of Tiburon, supra*, Appellant could not recover just compensation as a matter of law even if her land was *de facto* taken (Appendix A, p. A-14). Of course, *Agins*' soundness in that regard is now before this Court.

1973 (Finding 31, Appendix E, p. A-35), and assurances from Mott, the Director of the Parks Department in May 1974 (Findings 34 and 35, Appendix E, pp. A-36-37). It was in reliance on those representations that Appellant ceased further attempts to develop any economic use of her land[11] (Finding 37, Appendix E, p. A-37) in the property's condemnation-blighted condition.*

It cannot go without emphatic notice that the State offered not one iota of evidence to contradict, impeach, or rebut this wealth of economic testimony coming from eminently qualified witnesses, intimately familiar with the local real estate market. Accordingly, the trial court found (Findings 46-54, Appendix E, pp. A-42-43) that after May 1973, the subject property lost all economic use, return and/or marketability, and was *de facto* taken in March 1975. The findings were not contested on appeal.

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[11]The device by which Mott gave his assurances, was the representation that as soon as the voters adopted State Beach Park Recreation and Historical Facilities Bond Act of 1974, Appellant's property would be promptly acquired (Finding 34, Appendix E, p. A-36). On June 4, 1974 this Bond Act *was* adopted by the voters (Finding 38, Appendix E, p. A-37), and funds were appropriated by the legislature (and the Governor) to acquire the subject property, but no good faith attempt was made to acquire the subject property by purchase, and the condemnation action seeking to do so was not filed until some two years later, December 1976. In the meantime, as shown presently, *all* value, utility and marketability of the subject property were *totally* destroyed, leaving Appellant nothing except bare, nominal title (and even that subject to a *lis pendens* recorded by the State upon filing of its eminent domain action in 1976), and the dubious "privelege" of being obliged to pay mounting property taxes on utterly useless and unsaleable land.

*An attempted sale without disclosure of the State's "plans" would be a violation of the brokers' code of ethics and expose them as well as the seller to liability for misrepresentation (Finding 45, Appendix E, p. A-42).

The economic impact of the State's activities on the subject property was devastating to Appellant. Recall that she owed $5,000,000 to Wells Fargo Bank, and intended to use the proceeds of development of the subject property to repay that loan. Confronted with Wells Fargo's threat to call the loan as any economically viable use of the subject property began receding under the threat of condemnation into never-never land, Appellant set out to do what she could to salvage the situation and was forced to liquidate many of her assets.[12] However, it quickly became apparent that further pursuit of development would be an act of utter futility in light of the oncoming condemnation. The subject property had been stripped of all utility and value (Findings 46-54, Appendix E, pp. A-42-43), and *de facto* taken (Conclusion of Law), Appendix F, p. A-45).

As for the cumulative impact of the above State activities, the extensive publicity of the State's "plans" or "intent" to condemn the subject property, the passage of time, and their effect on the local real estate market, the evidence presented was overwhelming, clear and totally uncontradicted. It consisted of the testimony of Appellant's real estate lawyer and three highly experienced and knowledgeable local real estate brokers. All agreed that the State's announced and widely publicized intention to acquire the subject property for a beach park became com-

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[12]Evidence advanced before the trial court showed without contradiction that she suffered grievious losses; she was forced to sell other real estate holdings, and later a substantial part of her family inheritance in the form of Stauffer Chemical stock incurring large tax consequences. The full extent of those losses came out later at the post-trial hearing pertaining to valuation of delay losses. In short, Appellant was all but ruined. *The subject property is now in a tax sale status, with a lis pendens recorded against it.*

mon knowledge in the area following 1973, and as a result the subject property became unusable and unsaleable. It had no viable economic use, and there was no conceivable way in which it would generate *any* income or return. No broker would even list the subject property for sale, as there was nothing to sell.

In December 1976, 1¾ years after the subject property had been *de facto* taken (as determined by the trial court) the State finally filed its eminent domain proceedings. In the meantime, the instant [inverse condemnation] case was far advanced and went to trial first,[13] the trial court's findings on liability were filed on June 27, 1977, and its Judgment awarding just compensation was filed on March 30, 1978. Thereupon the State announced that it would not pay the judgment, and appealed.

By earlier stipulation, the sum of $1,750,000 was deposited into court for Appellant, even though the State's own appraiser was of the view that the value was higher (see Finding 42(1), Appendix E, p. A-41). That sum happened to be the amount the State had authorized to acquire the subject property (Finding 42, Appendix E, p. A-39)—a property which the jury found to be worth $3,900,000, *which value determination the State does not contest.*[14] Therefore, Appellant moved the trial court to set the

[13]Under California law, where direct and inverse condemnation actions are pending together, the one that goes to final judgment first and awards compensation, is deemed to be dispositive of both. *Klopping v. City of Whittier*, 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972).

[14]The State's appeal below was solely on the issue of inverse condemnation liability and delay damages (including interest rate). No error was asserted by the State as to valuation. Thus, under settled California law any claims of such error are deemed waived (see *Estate of Straisinger*, 247 Cal.App.2d 574, 578, fn. 1, 55 Cal. Rptr. 750, (1967) and authorities collected there).

eminent domain case for trial, so that she could receive just compensation for the now-admitted condemnation, and the trial court granted her motion. However, the State obtained a writ of prohibition from the California Court of Appeal (see Appendix A, p. A-10, fn. 5) staying that trial. Thus, Appellant was stripped of *all* value, utility, and marketability of her land back in 1975, but has been prevented from receiving full and just compensation in either the inverse or direct condemnation, prevented from meeting her financial obligations and rendered insolvent while soaring inflation is eroding her trial court award to a shadow.

Appellant now seeks relief from this Court. Since the question of whether a taking has occurred is a highly factual one, and here the trier of fact *found* a complete deprivation of all property rights in order to keep the subject property as "open space" until its formal acquisition could be accomplished, Appellant submits that a taking was established[15] and just compensation is called for.

INTRODUCTION

The case at bench presents this Court with a vexing and widespread constitutional problem that continues to generate large amounts of contentious litigation throughout the country, with results that, at best, vary drastically from state to state, even though the issue is one of *federal* constitutional dimension. The problem of so-called "con-

[15]In other words, this situation is the same as in *Nectow v. Cambridge*, 277 U.S. 183 (1928), where a trier of fact determined that the regulation destroyed the economic utility of the property, and was reversed by the Massachusetts Supreme Court. This court, in turn, reversed, holding that the determination by the trier of fact established a taking.

demnation blight" resulting from precondemnation activity and the inquiry of when such blight destroys constitutionally protected property rights so severely as to work a *de facto* taking, has resulted in a chaotic pattern of state and lower federal court decisions that are irreconcilable with one another, and in some cases with this Court's decisions.[16] Yet all these decisions purport to construe the same provisions of the Fifth and Fourteenth Amendments.

Moreover, this case confronts the Court with a shocking injustice that cries out for relief. As formally found by the trial court on overwhelming *and undisputed* evidence, Appellant was stripped of *all* value, utility and marketability of her land back in 1975. Yet, she was told below that she has no remedy whatsoever. Purporting to apply the California Supreme Court's decision in *Agins,* the court below ruled that Appellant could not seek just compensation when she was completely stripped of her property rights, because her supposed "remedy" was an action for nonmonetary relief, which—because of local procedural peculiarities—could only be brought some 1½ years before her cause of action even accrued, and which (as the court below conceded) she could not win. In short, the court below subordinated Appellant's federal constitutional rights to a bizarre local procedural anomaly, and thereby denied her any remedy whatever, in the process transforming her constitutional guarantee into a procedural game of the Catch-22 variety.

[16]As shown *infra,* several states' rules simply defy this Court's repeated interpretations of the Fifth Amendment's "just compensation" clause, as applied to blight situations where the market value of condemned land is depressed by advance announcements of local government intent to condemn. See *infra,* pp. 26.

THERE IS NO COHERENT LEGAL PRINCIPLE GOVERNING THE WIDESPREAD QUESTION OF WHEN INEQUITABLE GOVERNMENTAL PRECONDEMNATION ACTIVITIES EFFECT A DE FACTO TAKING OF PROPERTY SLATED FOR CONDEMNATION WHICH IS DELAYED WHILE SUCH PROPERTY IS BLIGHTED AND "REGULATED" INTO ECONOMIC OBLIVION

The "sword of Damocles" effect that afflicts private property slated for condemnation which is then delayed, is a familiar problem. See Nichols on Eminent Domain, Vol. 4, § 12.3151.[17] That problem has two manifestations, of which only one has received even a modicum of this Court's attention, while the other has gone without any definitive judicial oversight whatever, even though it is of widespread impact and of constitutional dimension.

The first and relatively easy manifestation of the problem, is the effect on values that follows announcements that specific properties are about to be condemned. This Court has dealt with that problem several times in the context of so-called project enhancement (i.e., values generally increasing in the area because of the desirable nature of the announcd public project—see *United States v. Miller,* 317 U.S. 369 (1943)); as well as in the context of precondemnation blight (i.e., values decreasing because of the undesirable nature of the project, or because the land slated for acquisition for either kind of project becomes shunned

[17]"It is one thing to have the sword of condemnation resting available but unpointed in the governmental sheath. It is another to have it suspended like that of Damocles directly above one's property." *Halpert v. Udall,* 231 F.Supp. 574, 579 (S.D. Fla. 1964), Choate, J., concurring, aff'd. per curiam 379 U.S. 645 (1965).

in the market—see *United States v. Virginia Electric P. Co.*, 365 U.S. 624, 625 (1961), *United States v. Reynolds*, 397 U.S. 14, 16 (1970)).

The principle is now settled that in neither situation may the fair market value awarded in condemnation proceedings—*if and when they come*[18] be distorted upwards or downwards by reason of the contemplated governmental acquisition, although it must be noted that even this relatively easy principle becomes so confused at times that several states simply ignore this Court's views and force their landowners to accept inadequate "just" compensation in the form of market values prevailing at the time of taking, even though such values are by then depressed by the market's reaction to the earlier announced coming of the condemnation.

Nor is the market's reaction alone the most serious problem. With depressing regularity condemning entities have tried to give the declining market a helping hand, and that is what this case is ultimately about. Such govern-

[18]A serious problem engendered by the delay is that some of the landowners, faced with departing tenants, loss of rents, loss of use, and inability to sell at anything resembling fair market value, while property carrying costs (taxes, insurance premiums, maintenance, etc.) go relentlessly on, are unable to hold out until the condemnation comes and face loss of their properties by foreclosure or tax sale (see, *Sayre v. United States*, 282 F. Supp. 175 (N.D. Ohio, 1967), *Klopping v. City of Whittier*, 8 Cal.3d 39, 104 Cal. Rptr. 1, 500 P. 2d 1345 (1972), *Conroy-Prugh Glass Co. v. Commonwealth*, 321 A. 2d 598 (Pa. 1974). Such owners have no choice but to seek inverse condemnation relief. Moreover, sometimes the announced condemnation plans may wreak havoc on the impacted property for years, but then the actual condemnation does not materialize, so that there is *no* opportunity to seek compensation, save only by inverse condemnation. See *Washington Market Enterprises, Inc. v. City of Trenton*, 343 A. 2d 408 (N.J. 1975), *Jones v. People*, 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165 (1978), *Richmond Elks Club v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977). *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Claims 1970).

mental activities take a wide variety of forms ranging from the subtle to the outrageous.[19]

By far the most common method is to "regulate" the targeted property in advance of condemnation so as to lower its value. This can take the form of a building moratorium (see *Kirschke v. City of Houston*, 330 S.W.2d 629 (Tex. 1959), overruled in *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978)), denial of building permits (*Director of Highways v. Olrich*, 5 Ohio St. 70, 213 N.E.2d 823 (1966), either altogether, or on condition that the owner "dedicate" gratis land that the condemning entity wants to acquire from him (*Mid-Way Cabinet etc. Mfg. Co. v. County of San Joaquin*, 257 Cal.App.2d 181, 65 Cal. Rptr. 37 (1967)), oppressive zoning (*Kissinger v. City of Los Angeles*, 161 Cal.App.2d 454, 327 P.2d 10 (1958),[20] and on-again, off-again building code enforcement (*City of Cleveland v. Hurwitz, supra*, 19 Ohio Misc. 184, 249 N.E.2d 562).

In all such cases the ostensibly "regulating" would-be condemnor piously asserts that it is only exercising its lawful police power for the public good, while it reaps impermissible benefits to itself in several ways.

By denying to landowners (whose properties are slated for condemnation) the right to use and improve their land,

[19]In some areas of the Midwest the process of softening up the landowners for forthcoming acquisition of their property went so far as to withhold trash pickup and police protection from the targeted areas; *City of Cleveland v. Hurwitz*, 249 N.E.2d 562 (1969, Ohio Misc.). Also see *Amen v. City of Dearborn*, 363 F.Supp. 1267, rev'd on other grounds, 532 F.2d 554 (1967, 6th Cir.).

[20]Such precondemnation zoning schemes can at times get byzantine; see *United States v. Certain Lands in Truro etc.*, 476 F.Supp. 1031 (D. Mass. 1979).

the would-be condemnor guarantees itself a cheaper acquisition price because, obviously, land unapproved for higher use or improvement is cheaper. Moreover, such a condemnor (particularly in the case of large projects in populated areas, such as urban redevelopment or major urban highways) thus guarantees itself a windfall as many owners of such properties, who find themselves locked into nominal but economically unproductive "ownership" whereby they must pay taxes, insurance premiums and incur other carrying costs but derive no economic benefit, simply have no alternative but to sell at a distress price, with the condemnor as the only ready buyer.[21]

The foregoing problems, however, are only the tip of an iceberg. A far more difficult problem follows where the threatened condemnation fails to materialize or is delayed for an extensive period of time during which the affected landowners are precluded from using their land. This is a serious situation that often leads to foreclosures and tax sales (see e.g. *Sayre v. United States,* 282 F.Supp. 175 (N.D. Ohio 1967), *Klopping v. City of Whittier,* 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972), *Conroy-Prugh Glass Co. v. Commonwealth,* 321 A.2d 598 (Pa. 1974), *Macmor Mortgage Corp. v. Exchange Nat. Bank,* 332 N.E. 2d 740 (Ill. App. 1975)).

Such owners have no choice but to seek a remedy by inverse condemnation actions, on the theory that the pre-

[21]Obviously, few—if any—prospective private buyers in the market are willing to pay a fair price for property which is of limited utility (being slated for condemnation) and which is certain to carry a condemnation lawsuit with it. See the observations of the courts in *Madison Realty Co. v. City of Detroit,* 315 F.Supp. 367, 371 (E.D. Mich. 1970), and *Drakes Bay Land Co. v. United States,* 424 F.2d 574, 586[4] (Ct. Claims 1970)

condemnation activities and the market's reaction have together worked a *de facto* taking by effectively depriving them of their property. But whichever way the problem is presented to the courts (i.e., whether by inverse condemnation or by inquiry into the proper measures of just compensation for losses and takings in the direct condemnation (when and if it finally comes), the decisional pattern around the country is simply chaotic. Several wholly irreconcilable approaches (with variations) have emerged, each purporting to construe the "just compensation" clause of the Fifth Amendment.

At one end of the spectrum are the courts of several states, that for all practical purposes defy this Court,[22] and hold that the aggrieved landowner has absolutely no remedy in such cases and must suffer an award of "just" compensation depressed by condemnor's acts. See *Chicago v. Loitz,* 329 N.E.2d 208 (Ill. 1975), *Bakken v. Montana State Highway Comm.,* 382 P.2d 550 (Mont. 1963). Indiana too is in this camp, and has applied such rule under draconian circumstances: *City of Gary v. Ruberto,* 354 N.E. 2d 786 (Ind. App. 1976). So has Massachusetts: *Fram v. Boston,* 292 N.E.2d 356 (Mass. 1973).

Next comes Ohio which follows a rule approaching *Virginia Electric/Reynolds* (i.e., it does not permit the con-

[22]As noted *supra,* in *United States v. Virginia Electric Power Co.,* 365 U.S. 624, 625 (1961), and in *United States v. Reynolds,* 397 U.S. 14, 16 (1970), this Court was outspoken in making it clear that it is violative of the Fifth Amendment's just compensation guarantee for a condemning agency first to depress values and then to reap the benefit of condemning at such depressed values. As shown in the text, the courts of some states ignore that principle, and by rigid adherence to a statutory date of value permit condemnors to violate the *Virginia Electric/Reynolds* rule by depressing values before that date arrives.

demnor to condemn at self-depressed values), but does not permit the owners to recover any losses other than the value of the subject property *as it was* before the condemnor depressed it: *City of Cleveland v. Carcione,* 118 Ohio App. 525, 531, 19 N.E.2d 52, 55-56 (1963). While better than the confiscatory Illinois rule, *supra,* this approach too is grossly unfair to the owner in an inflationary economy; it pays him the value of his property as it was years before its taking.

Next comes a group of states which follow the so-called basic blight rule; i.e., they award just compensation in the direct condemnation (when it finally comes) as if the condemnor-caused depression in values did not occur. *State Road Dept. of Florida v. Chicone,* 158 So.2d 753 (Fla. 1963), *Congressional School of Aeronautics v. State Roads Comm'n,* 146 A.2d 558 (Md. 1958), *Uvodich v. Board of Regents,* 453 P.2d 229 (Ariz. App. 1969). This approach, of course, does not address the plight of landowners driven to the wall by the delay and unable to hold out (as against foreclosure, tax sale or distress sale) until the condemnation comes.

Wisconsin has an anomalous rule that does not fit readily into a spectrum. On the one hand, Wisconsin is quite liberal to the blighted condemnee when the direct condemnation finally comes (see *Luber v. Milwaukee County,* 47 Wis. 2d 271, 177 N.W.2d 380 (1970)—held: rents lost while the taken building stood empty awaiting condemnation are constitutionally recoverable in addition to the building's fair market value). Yet on the other hand, Wisconsin takes a harsh position toward the owner of condemnation-blighted land when after long delay he seeks to recover

in inverse condemnation (see *Howell Plaza, Inc. v. State Highway Commission,* 284 N.W.2d 887 (Wis., 1979) held: owner of land in the path of a highway should have developed it anyway, and not having done so, was not entitled to recovery).[23]

Next comes the states which follow the basic blight rule but also recognize the aggrieved owner's right to bring an inverse condemnation action when the governmental precondemnation activities so trench on his property rights as to work a *de facto* taking. The problem is that practically no two states agree on what constitutes a *de facto* taking within the meaning of the Fifth Amendment. New York spoke out early on this subject, and after some equivocation (see *City of Buffalo v. Geo. Irish Paper Co.,* 299 N.Y.S.2d 8 (App. Div. 1969)) articulated a rule dichotomizing between blight (i.e., precondemnation value decrease) and *de facto* taking: *City of Buffalo v. J.W. Clement Co.,* 28 N.Y.2d 241, 269 N.E.2d 895 (1971). The *Clement* approach has it that a *de facto* taking occurs only if there has been physical invasion or direct legal restraint on the owner's right of user. This approach creates a giant loophole in favor of the would-be condemnor who can thus blight property for indefinite periods of time with impunity; it gets to reap the windfall of distress sales, and as to those owners who can hold out until the condemnation comes, it never has to pay more than fair market value when it finally gets around to actually condemning. The

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[23]One can hardly imagine a more ill-advised ruling. Are we to understand that an owner who is solemnly told by state officials that his land is slated for imminent condemnation should go through the shockingly wasteful endeavor of improving it, only to have the state's bulldozers knock down the improvements (after paying for them) shortly after they are completed.

owners' interim losses and carrying costs go uncompensated. Not surprisingly, *Clement* evoked criticism and a mixed judicial response. Only Oklahoma (*Empire Construction, Inc. v. City of Tulsa,* 512 P.2d 119 (Okla. 1973)), and Colorado (*Lipson v. Colorado State Dept. of Highways,* 588 P.2d 390 (Colo. App. 1978)) have chosen to follow *Clement* unequivocally.

In sharp contrast with the latter two states, Oregon expressly took a different approach, and refused to follow *Clement* (see *Lincoln Loan Co. v. State,* 545 P.2d 105, 109-110 (Ore. 1976)), choosing instead a fairer standard of recovery.[24]

Similarly, the harsh limitations of the *Clement de facto* taking rule were found unacceptable by the courts of New Jersey (*Washington Market Enterprises, Inc. v. City of Trenton,* 343 A.2d 408 (N.J. 1975)), Connecticut (*Textron, Inc. v. Wood,* 355 A.2d 307 (Conn. 1974)), and Washington (*Lange v. State,* 547 P.2d 287 (Wash. 1976)).

Then there is California—unquestionably in a class by itself. For decades, California law on point was in a state of outright contradiction.[25] Then, in *Klopping v. City of Whittier,* 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972), the California Supreme Court clarified the law. *Klopping*

[24]Note that *Lincoln Loan* also expressely refuses to follow the Illinois *Loitz* rule (discussed *supra*), as well as the old Texas rule of *City of Houston v. Biggers,* 380 S.W.2d 700 (Tex. 1964); the latter case, however, is probably no longer authoritative even in Texas, in light of *City of Austin v. Teague,* 570 S.W.2d 389 (Tex. 1978).

[25]Compare *Atchison, Topeka & Santa Fe Ry. Co. v. Southern Pacific Co.,* 13 Cal.App.2d 505, 517, 57 P.2d 575 (1936), with *Buena Park School Dist. v. Metrim Corp.,* 176 Cal.App.2d 255. 258-259, 1 Cal.Rptr. 250 (1959).

(a) forbade precondemnation depression of values, and (b) recognized an inverse condemnation cause of action for unreasonable blighting and for *de facto* takings. This rule (as applied to inverse condemnation cases) was limited in *Selby Realty Co. v. City of San Buenaventura,* 10 Cal.3d 110, 109 Cal.Rptr. 799, 514 P.2d 111 (1973), to make clear that such right of action applies only to precondemnation activities, not general planning. The rule constricted from then on, with different California appellate courts choosing as if from an intellectual smorgasbord whether any given case is more like *Klopping* or more like *Selby.*[26]

The point of the preceding state law survey is that while all these courts purport to be construing the Fifth Amendment's prohibition against uncompensated takings, about the only thing one can agree with is that there is no agreement among them. The citizen of Illinois, for example, may as well be governed on this point by a foreign power, as compared with, say, a citizen of Oregon. Both these states profess to be construing the same provision of the *supreme, organic law,* yet, they *expressly* and diametrically disagree with one another as to what that organic law means.

Similar inconsistencies may be found in federal law. Although not as irreconcilable as in the case of state courts, federal court decisions in this field likewise are unclear. It

[26]Compare e.g. *Smith v. State,* 50 Cal.App.3d 529, 123 Cal.Rptr. 745 (1975), with *People v. Peninsula Enterprises, Inc.,* 91 Cal.App. 3d 332, 153 Cal.Rptr. 895 (1979), involving virtually identical facts concerning delay in highway condemnation; yet, *Smith* held that no inverse condemnation cause of action had been stated while *Peninsula Enterprises* awarded substantial damages in a direct condemnation case. But see *Stone v. City of Los Angeles,* 51 Cal.App. 3d 987, 124 Cal.Rptr. 822 (1975). Appellant submits that this confusion results from focusing solely upon the *nature* of the governmental act and goals, rather than upon the *effects* of governmental acts, regardless of their nature.

was in the federal courts that the seminal idea of seeking relief in inverse condemnation on a *de facto* taking theory first emerged: *Foster v. Detroit,* 254 F.Supp. 655 (E.D. Mich. 1966), aff'd 405 F.2d 138 (6th Cir. 1968). Since *Foster,* some federal courts have entertained such cases and have granted relief; see e.g., *Thomas W. Garland, Inc. v. St. Louis,* 596 F.2d 784 (8th Cir. 1979), *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency,* 561 F.2d 1327 (9th Cir. 1977), *Haczela v. Bridgeport,* 299 F.Supp. 709 (D.Conn. 1969), *Sayre v. United States,* 282 F.Supp. 175 (N.D.Ohio 1967).[27] *Eleopoulos v. Richmond Redevelopment Agency,* 351 F.Supp. 62 (N.D. Cal. 1972), *Madison Realty Co. v. Detroit,* 315 F.Supp. 367 (E.D.Mich. 1970).

Other federal courts have taken a different position: *Southpark Square Ltd. v. City of Jackson,* 565 F.2d 388 (5th Cir. 1977), *Donohoe Construction Co. v. Montgomery County Council,* 567 F.2d 603, (4th Cir. 1977).[28]

The U.S. Court of Claims takes a different and somewhat more consistent approach. It has made it clear that where governmental ostensible regulation is used to facilitate planned condemnation, a *de facto* taking will be found: *Benenson v. United States,* 548 F.2d 939 (Ct.Cl. 1977),

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[27]Note however that *Sayre* eventually articulated the rule that inverse condemnation relief was not available in the federal courts for blighting activities impacting on peripheral properties that were *not* scheduled for condemnation. *Sayre v. Cleveland,* 493 F.2d 64 (6th Cir. 1974). Also see, *Woodland Market Realty Co. v. Cleveland,* 426 F.2d 955 (6th Cir. 1970).

[28]The juxtoposition of these two cases illustrates the confusion. While *Donohoe* holds that six-month delay in condemnation is not so unreasonable as to be actionable, *Southpark Square* seems to conclude (quite wrongly) that a city may use its police power to frustrate use of private property slated for condemnation.

Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct.Cl. 1970). On the other hand where the government's conduct is not acquisitory, and its involvement is solely a regulation, a finding of a taking may not be made; see *DeTom Enterprises, Inc. v. United States,* 552 F.2d 337 (Ct.Cl. 1977); but see *Bydlon v. United States,* 175 F.Supp. 891 (Ct.Cl. 1959).

In sum, federal courts do recognize the availability of an inverse condemnation right of action in cases of claimed *de facto* taking arising from precondemnation activities that cause a blighting of property slated for acquisition, but their rationale for affording or denying such relief on any given state of facts remains unclear.

This is an important, if neglected, area of constitutional law, that cries out for clarity and analytical intervention by the Court, which so far it has never had.

THE ISSUE OF PROPER REMEDIES IN CASES OF NON-PHYSICAL TAKINGS IS NOW BEFORE THIS COURT, AND THE CASE AT BAR PROVIDES AN ESPECIALLY VIRULENT VARIANT OF THE INJUSTICE THAT RESULTS FROM DENIAL OF THE JUST COMPENSATION REMEDY

The case on whose rationale the court below denied recovery of just compensation to Appellant is *Agins v. City of Tiburon,* 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), probable jurisdiction noted, No. 79-602. In view of the fact that *Agins* is now before this Court on the merits, it would seem unnecessary to consume additional effort and space briefing the issue of remedies. The Court's attention is therefore respectfully invited to the following briefs in No. 79-602 in which the landowner's position is

briefed: Jurisdictional Statement, pp. 19-29, and Appellant's Brief, pp. 31-55.[29]

However, the facts at bench illustrate a variant of the *Agins* problem which goes beyond the basic remedial issue for "mere" total downzoning presented there. Here, it is no longer a case of invalidation vs. compensation, for here seeking anything but compensation would be both futile and absurd. This case is illustrative of the widespread problem in which an invalidation remedy is the height of futility. What conceivable good would it do to anyone to burden the judiciary with litigation ostensibly seeking the invalidation of an administrative act or the mandating of the issuance of a permit, when the "regulatory" entity (should it lose) can simply file a condemnation action (as it did at bench) and thereby expose the entire process for the useless exercise that it is?

Moreover, the case at bench adds another dimension to the inefficacy of invalidation as a remedy. The regulation that works a taking can *only* be invalidated—so said the California Supreme Court in *Agins* whose holding was then applied below to the case at bench. But here the *de facto* taking did not occur until March 1975 (see Appendix F, p. A-45), whereas the permit denial had to be challenged under state law in 1973 (as conceded by the Court below; see Appendix A, p. A-5). Thus, what is before this Court for review is a *reductio ad absurdum* extrapolation of *Agins* whereby a rigid insistence on the use of the invalidation "remedy" requires the aggrieved owner to sue to invalidate a precondemnation misapplication of a regulatory device which itself was confiscatory, all before

[29]The case at bench is discussed in Appellant's Brief, pp. 48-50.

the cause of action even accrues (i.e., here in order to satisfy the Court below Appellant would have had to sue for mandamus in 1973, 1½ years before her taking cause of action accrued).

CONCLUSION

This case provides this Court with a dramatic illustration of the extremes to which California has carried its unsound *Agins* rule, and provides an urgent reason for corrective action and sound constitutional guidance for all jurisdictions. Assuming that the lower Appellate Court properly classified the State's acts as purely regulatory, their effect was (alone) found confiscatory; thus the issues of *Agins* are clearly presented here.

But far beyond legitimate lands use regulation, the Trial Court below found *misuse* of facially regulatory devices to facilitate condemnation of Appellant's property. Such unmonitored socialization of private property without compensation for the benefit and enrichment of society as illustrated by this case not only has a "chilling effect" upon private incentive, productivity and our nation's economy, but it strikes at the heart of our citizens' individual liberties. What citizen dare speak or act against a government misuse of police powers if his property (representing his past liberty voluntarily conferred to society) is totally at risk?

Appellant does not question the purposes, goals and public uses of environmental legislation or public parks. This is not the issue here. Rather, Appellant respectfully urges such laudible ends do not justify unconscionable means and unconstitutional results.

Justice, constitutional soundness and the need for clear precedent compel consideration of the issues and relief in this case.

Mrs. Briggs prays that probable jurisdiction be noted or that pursuant to 28 U.S.C. § 2103, certiorari be granted.

April, 1980

Respectfully submitted,

JESS S. JACKSON
GIDEON KANNER
Attorneys for Appellant

(Appendices follow)

Appendices

Appendix A

Opinion of the Court of Appeal of California

[Civ. No. 44189. First Dist., Div. Two. Oct. 30, 1979.]

[As modified Nov. 29, 1979]

Mitzi S. Briggs, Plaintiff and Appellant, v.
The State of California ex rel. Department of
Parks and Recreation, Defendant and Appellant.

COUNSEL

Evelle J. Younger and George Deukmejian, Attorneys General, Robert L. Bergman and R. H. Connett, Assistant Attorneys General, Leonard M. Sperry, Jr., Christopher M. Ames and Richard C. Jacobs, Deputy Attorneys General, for Defendant and Appellant.

Jackson & Gughemetti, Jess S. Jackson, Jr., and Gideon Kanner for Plaintiff and Appellant.

OPINION

TAYLOR, P.J.—The State of California, acting by and through the Department of Parks and Recreation (Department) appeals from a judgment in inverse condemnation awarding damages in excess of the sum of $6,000,000 to the property owner, Briggs, contending that: 1) Briggs had no cause of action for damages for inverse condemnation as a result of the California Coastal Zone Conservation Commission's (State Commission) denial of a permit or the Department's manifestation of an interest in acquiring the property; 2) the findings are not supported by the record and do not support the judgment; and 3) in the alternative,

even if Briggs is entitled to damages for inverse condemnation, the amount awarded was excessive and an erroneous rate of prejudgment interest was applied; Briggs cross-appeals, contending that the court erred by limiting her post-judgment interest to 7 percent and failing to award her reasonably incurred litigation expenses pursuant to Code of Civil Procedure section 1036. We have concluded that the judgment must be reversed as it was predicated on the erroneous legal theory that Briggs had a cause of action for inverse condemnation; accordingly, the remaining contentions on appeal and the issues raised by the cross-appeal need not be addressed.

As we have concluded that the judgment was based on an error of law, we shall not set forth in detail the trial court's findings and conclusions.[1] We trace the factual and procedural history in the light of the evidence relevant to our discussion: Since 1963, Briggs owned the subject property, 35.6 acres of raw, undeveloped land on the coast in Monterey County (County). In October 1972, Briggs obtained building permits from the County for development of three small residential homes on the property. Prior to November 8, 1972, Briggs commenced construction on the property, including commencement of excavations for footings, and placements of concrete foundations. On March 19, 1973, she obtained two new permits for different and much larger houses upon cancellation of the earlier permits. On April 4, 1973, Briggs applied to the County for approval of a "Minor Subdivision" development on the subject property and stated in her application that the property would be

[1]Nor will we discuss the errors in the findings and conclusions or the insufficiency of the evidence unless pertinent to our disposition of the appeal.

used for three single family residences. The County approved Briggs' application on November 7, 1973.

On April 16, 1973, Briggs filed an application for a development permit with the Central Coast Regional Commission (hereafter Regional Commission) of the State Commission, seeking a development permit for the construction of three single family residences and accessory structures as approved by the County in March 1973; she also filed for an exemption for construction of the three residences.

On May 17, 1973, William Penn Mott, Jr., then Director of Parks and Recreation of the State of California, sent to Olney Smith, Executive Director of the Regional Commission, a telegram stating: "The California Department of Parks and Recreation considers the Briggs property desirable as an addition to the existing Carmel River State Beach property." On May 18, 1973, Milton Frincke, District Superintendent of the Department of Parks and Recreation, Operations Division, District 4, executed and sent a letter to Smith stating: "We are very concerned about the possibilities of a proposed large scale development on the Briggs property, adjacent to the Carmel River State Beach. This is immediately south of Carmel Meadows. When plans are proposed, we would like to comment."

On June 18, 1973, after a public hearing, the Regional Commission passed a resolution denying Briggs' application for a permit.[2]

[2]The court's findings placed undue emphasis on the procedures and decision of the Regional Commission. The proceedings before the State Commission, however, are de novo and completely nullify the former determinations of the Regional Commission (REA Enterprises v. California Coastal Zone Conservation Com., 52 Cal.App.3d 596, 612-613).

On August 8, 1973, the State Commission denied Briggs' application for a permit, for the following reasons, as stated in its staff recommendation: "1. *Open Space Use.* The parcel is one of two privately-owned coastal areas between Point Lobos and the mouth of the Carmel River. The California Department of Parks and Recreation considers the property desirable as an addition to the Carmel River State Beach property. *Although the State Parks Department does not have a definite commitment to purchase the property, there is clearly a need for preserving the Commission's planning options as to coastal parks in this area.* Because of the manner in which the 3 homes would be spaced along the ocean bluff, construction of the homes would foreclose the possibility of acquiring either all the ocean front property or acquiring only portions and allowing the rest to be developed.

"Even if the Commission's planning process were to determine the acquisition is not desirable, it is too early in the planning process to decide that development should proceed in the manner proposed by applicant. It might be preferable to require clustered development on the portion of the property adjoining an existing subdivision, with the remainder of the property left as open space, to maintain as much as possible of the scenic qualities of the property.

"2. *Inducement to Development.* Although the proposed project consists only of the construction of 3 large homes, the applicant's claim of exemption states that the total development will have 2 more stages, 1 of which is a subdivision application in operation and the second of which is a planned unit development currently in the si

[sic] stage. Once the 3 homes are built, the property will be foreclosed from any significant open space or recreational use along the ocean front, which will in turn on [sic] that the property will be committed to further development. The road servicing the three homes runs along almost the entire ocean frontage of the property and together with utility extensions would encourage further development" (emphasis partially added). Briggs filed no mandate action to challenge the decisions of the State Commission.[3]

On September 7, 1973, Joseph Bodovitz, Executive Director of the State Commission notified Briggs that her appeal on an application for an exemption had been denied because she had not obtained building permits for the projects for which she claimed vested rights prior to the effective date of the Act, and the expenditures made were not in reliance on the plans for which building permits had been issued prior to November 8, 1972.

On September 28, 1973, William Penn Mott, Jr., executed and sent a letter to Briggs stating, in part, "in reply to an inquiry from the Coastal Zone Conservation Commission this department [Parks and Recreation] informed the Commission that *it does have an interest* in acquiring your property in the Carmel area *and will take further steps* to do so *when funds are available for such purpose.*" (Emphasis added.) On October 31, 1973, Lt. Governor Ed

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[3]Pursuant to the then applicable provisions of former Public Resources Code section 27424, a petition for mandate had to be filed within 60 days after the State Commission's decision (see present Pub. Resources Code, § 30801). Her failure to do so renders the State Commission's decision immune from objections in a collateral proceeding (Stockton v. Department of Employment, 25 Cal.2d 264, 267-268; DeCelle v. City of Alameda, 221 Cal.App.2d 528, 535).

Reinecke executed and sent a letter to Briggs stating, in part, that he had been in contact with Mott and that the State of California was very much interested in purchasing the subject property.

On May 9, 1974, Briggs and her attorneys met with Mott and Les McCargo of the Department. At that time, Briggs and her attorneys advised Mott that the state's conduct had prevented development and viable use of the subject property, and caused financial and economic injuries to Briggs. Briggs and her attorneys further informed Mott that unless the state gave some assurances that the property will be directly condemned then she would have to commence an inverse condemnation action, among other legal remedies. Mott then assured Briggs that the Department had an interest in acquiring her property and that it was among the top properties in the state for public acquisition. Mott also indicated to Briggs that a condition[4] of the Department's acquisition of the property was passage by the California voters of the June bond issue (State Beach, Park Recreation and Historical Facilities Bond Act of 1974) and that if this bond measure passed, the state would promptly acquire the subject property.

On May 9, 1974, after the above meeting, Mott executed and delivered a letter drafted by Briggs' attorney to Briggs, stating that the Department "intends to acquire, by negotiation or condemnation, fee title to your property above referenced if the pending ballot measure authorizing the issuance of Bonds is passed by the electorate this June,

[4]The trial court's findings that the passage of the bond issue was the only condition to the state's acquisition and that all other steps were mere procedural formalities is not supported by the evidence.

1974. *In the event said bond issuance is approved,* the State Park and Recreation *will then adopt a resolution* authorizing said acquisition, and *we will commence appraisal procedures and we will negotiate with you* to acquire said property. . . . As we have previously stated, *we have been interested in acquiring this property for many years, but have been unable to do so for the sole reason that funds to acquire the same have been unavailable.* If the Bond issue passes, this property will be included for prompt acquisition inasmuch as sufficient funds will then be available when the bonds are marketed" (emphasis added).

On June 4, 1974, the California electorate passed the bond issue. Thereafter on July 12, 1974, the Department passed a resolution directing, pursuant to the State Beach, Park, Recreational and Historical Facilities Bond Act of 1974, a study of a project involving an addition to the Carmel River State Beach, recommended this project, subject to the procedures of the bond act, and such implementation as necessary by the Director of the Department.

On July 23, 1974, Mott executed and sent a memorandum to Norman B. Livermore, Secretary for Resources, that: 1) designated the Briggs' property within the acquisition program derived from the State Beach, Park, Recreational and Historical Facilities Bond Act of 1974; and 2) designated funds for acquisition of the Briggs' property; and 3) stated the "scope" of the project as "to insure the continued scenic beauty of this green space, provide public access to the public beach, and to tie together portions of the Carmel River State Beach separated by a physical barrier"; and 4) stated that the recommended future state development "would include hiking trails, scenic overlook

and possible picnic area development"; and 5) stated that the Briggs property "is presently threatened with residential development"; and 6) stated that "the outstanding scenic qualities of this parcel make it a desirable addition to the Carmel River State Beach, Point Lobos complex"; and 7) stated that the operational effectiveness of the park unit would be enhanced by merging the separated sections of Carmel River State Beach that then could be more effectively patrolled and a considerable time saving in maintenance; and 8) concluded "this property is threatened by development and should be preserved for public use. This property will add needed upland to an existing State Beach, supplying access to the beach and to scenic overlook areas."

On September 27, 1974, the Governor signed chapter 1484, Statutes of 1974, Item 410.7B(ii) authorizing $1,750,000 for acquisition of the Briggs property from the State Beach, Park, Recreation and Historical Facilities Fund of 1974. Subsequently, efforts were made to find a manageable method to meet the public prescriptive easement requirement of the statute. After several months of meetings to iron out the difficulties with the prescriptive easement investigation procedure, the Legislature changed the procedure, effective May 2, 1975.

After January 1, 1975, a change of administration occurred with the election of a new Governor and appointment of new Secretary of Resources and Director of Parks and Recreation. Acquisition projects then in progress were held in abeyance pending review by the Secretary of the Resources Agency.

In January, 1975, review of the Department's budget estimate for acquisition of the subject property was requested of the Real Estate Services Division of General Services. The acquisition request by the Department to the Department of General Services to commence acquisition procedures regarding the Briggs property was made in May 1975, after the passage of the legislation which changed the provisions regarding prescriptive easement investigations. After passage of this measure, the General Services Department began the implied dedications study of all the property provided for in the appropriations bill.

Briggs filed the instant inverse condemnation action on August 2, 1975.

On October 28, 1975, the prescriptive easement investigation as to the Briggs property was concluded. The state could not commence the appraisal phase of the acquisition until after the prescriptive easement investigation was concluded. In December 1975, a contract was signed for an independent appraisal of the subject property. The appraisal was originally scheduled for completion by May 1976, but the appraiser's trial schedule required an extension; the appraisal was delivered on June 16, 1976.

On August 30, 1976, the Public Works Board authorized the Department of General Services to negotiate for the property and approve an augmentation to the amount previously budgeted because the appraiser's value was higher than that previously budgeted. On September 27, 1976, the Public Works Board passed a resolution authorizing the acquisition of the subject property. On De-

cember 31, 1976, the state filed a direct condemnation action against the property.[5]

The court found that: After May 1973, the state's denial of Briggs' applications and acquisition activities: 1) caused the property to be unmarketable in the open market in relation to its fair market value, or otherwise, and to have no viable economic use or return in relation to its value, or otherwise; 2) blocked and prevented any higher use or return on the subject property or the proceeds from a fair market sale. The court also found that as a direct and proximate result of the state's assurances, representations and promises to acquire the subject property from and after May 1974, Briggs ceased further attempts to develop any economic use of her property and incurred substantial economic and financial losses and damages to her property, as well as delay in payment of just compensation, and that the State Commission's denial of Briggs' application for a development permit and exclusions were pursuant to a policy to preserve the subject property in its then undeveloped status pending its acquisitions.

The trial court concluded that on March 27, 1975, the state had accomplished a de facto taking of the Briggs property and that, therefore, she was entitled to receive the fair market value of the property as of that date, damages incurred between the denial of the permit on August 8, 1973, and the taking, on March 27, 1975, and interest from the date of taking. The valuation phase commenced

[5]In People v. Superior Court (Briggs), No. 44236, decided November 17, 1978, this court issued a peremptory writ of mandate staying the trial of the condemnation action until the final determination of the instant appeal.

on August 29, 1977, and the jury rendered a verdict of $3,900,000 as the fair market value of the property on March 27, 1975. Briggs' other claims for damages were bifurcated and tried by the court. On March 30, 1978, judgment was entered in favor of Briggs in the sum of $6,429,437, offset by the Department's previously deposited sum of $1,750,000, or a total of $4,679,437; this amount included the fair market value of the property ($3,900,000), damages of $469,300 for the 19-month period (Aug. 1973-March 1975) and over $1,000,000 in prejudgment interest. Briggs also recovered litigation expenses of $957,002, including attorney fees in the amount of $751,500. This appeal and Briggs' cross-appeal ensued.

As indicated above, the trial court found and concluded that as a result of the State Commissions denial of Briggs' application for a permit as a result of the Department's interest in, and intent to acquire, the property, the Department was liable to Briggs in inverse condemnation. The court's findings and conclusions are contrary to State of California v. Superior Court (Veta) 12 Cal.3d 237, and its progeny. In Veta, our Supreme Court considered a claim of inverse condemnation based on the denial of a permit application by the State Commission under the 1972 Act[6] and the allegation that the permit was denied in

[6]The California Coastal Zone Conservation Act of 1972 was enacted by the People of the State of California as an initiative measure on November 7, 1972. The Act declared the California Coastal Zone to be a "delicately balanced ecosystem" whose preservation and protection for present and succeeding generations was a matter of paramount concern to the state and nation (former Pub. Resources Code, § 27001).

The 1972 Act created the California Coastal Zone Conservation Commission and six regional commissions; it directed them to undertake whatever studies were necessary to determine the proper

order that the affected property would " 'remain undeveloped and devoted to, and held for, public use as open space land' " (p. 252). The court, at page 253, rejected the claim that such a denial amounted to a constitutional "damaging" of property, on the ground that the Coastal Act was only an interim measure designed "to assure that developments in the coastal zone are consistent with the objectives of the Act so that priceless coastal resources are not irreversibly committed to uses which would be inconsistent with the plan ultimately developed."

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planning principles and assumptions needed to ensure the conservation and protection of coastal zone resources. Based upon those studies, the Commissions were directed to develop and adopt a California Coastal Zone Conservation Plan for submission to the Legislature (former Pub. Resources Code, §§ 27200-27201; 27300-27304; 27320).

During the period necessary for preparation of the plan and consideration of it by the Legislature, the Commissions were granted broad regulatory controls over proposed developments within the permit area of the coastal zone. Any person who wished to develop property within the zone was required to obtain a permit from the appropriate Regional Commission; any determination by the Regional Commission was thereafter subject to de novo review on appeal by the State Commission. (Former Pub. Resources Code, §§ 27400, 27423.) The Commissions could approve such an application only if they found that the proposed development would not have a substantial adverse environmental or ecological effect, and would not be inconsistent with the policies and objectives of the Act (former Pub. Resources Code, §§ 27400, 27423, 27402).

The 1972 Act, by its own terms, expired on December 31, 1976 (former Pub. Resources Code, § 27650). Prior to that time, however, the Commissions had prepared the California Coastal Plan and had submitted it to the California Legislature. The Legislature found that the plan conformed to the requirements of the 1972 legislation (Pub. Resources Code, § 30002). The Legislature further concluded that some of the recommendations of the Commissions were appropriate for immediate implementation, that some of them required further study, and that other similar means were appropriate for implementation. The Legislature then enacted the California Coastal Act of 1976 (Pub. Resources Code, § 30000, et seq.).

Our Supreme Court noted that numerous cases had previously upheld the validity of temporary regulatory measures enacted to preserve the status quo pending adoption of a comprehensive land use plan, and that the 1972 Coastal Act was designed to accomplish a similar purpose. The court held that the State Commission's denial of a permit was indistinguishable from that involved in Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com., 11 Cal.App.3d 557. In Candlestick, this court (Division Four) upheld the validity of the denial of a permit to fill the San Francisco Bay, even though the complaint alleged that the property had been rendered completely valueless.

As this court recently indicated in People v. Superior Court (Tidwell) 91 Cal.App.3d 95, 108-109, since Veta, supra, a number of Courts of Appeal have held that the denial of a building permit during the preparation of the coastal zone plan does not amount to a taking of property for public use without compensation (Patterson v. Central Coast Regional Com., 58 Cal.App.3d 833; Davis v. California Coastal Zone Conservation Com., 57 Cal.App.3d 700; Reed v. California Coastal Zone Conservation Com., 55 Cal.App.3d 889; CEEED v. California Coastal Zone Conservation Com., 43 Cal.App.3d 306). In Patterson, supra, this court (Division Four) recognized, at page 849, that designation of coastal properties for priority acquisition that would then lead to the mobilization of funds and the decision whether or not to acquire the property so designated, was a " '. . . mandatory element of the forthcoming Coastal Zone Conservation Plan,' " and a legitimate exercise of the police power that did not amount to

inverse condemnation.[7] Here, the State Commission's denial of Briggs' permit was an exercise of the statutory mandate. The Department's expression of interest in acquiring the Briggs property when funds became available was, at most, a designation and assignment of priorities so that resources could be mobilized.

Recently, in Agins v. City of Tiburon, 24 Cal.3d 266, at pages 272-273, our Supreme Court discussed the reasons underlying its ruling in Veta, supra, and rejected a constitutional argument similar to that made by Briggs here. In doing so, our Supreme Court said, at page 272: "Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional 'taking of [plaintiffs'] property without payment of just compensation' for which an action in inverse condemnation will lie. Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing the preferable view to be that, while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available. This conclusion is supported by a leading authority (1 Nichols, Eminent Domain (3d rev. ed. 1976) Nature and Origin of Power, § 1.42(1), pp. 1-116 through 1-121). . . ."

[7]Even prior to the coastal legislation, the courts upheld against claims of inverse condemnation, temporary or interim measures restricting development while public entities considered the properties for purchase (Metro Realty v. County of El Dorado, 222 Cal.App.2d 508; Hunter v. Adams, 180 Cal.App.2d 511).

The court (at p. 273) also reiterated that the proper and sole remedy is administrative mandamus. As indicated above, Briggs failed to pursue this remedy. Her contention on appeal that her failure to do so would have been an idle act is spurious.

Briggs, however, contends that the trial court's ruling was correct, as the above authorities are distinguishable since in the instant case the Department indicated to the Regional and State Commissions that the property would be a desirable addition to the State Park System and this indication had a permanent effect of diminishing the value and development potential of her property. As indicated above, even if so, Briggs' remedy was by mandamus (City of Walnut Creek v. Leadership Housing Systems, Inc., 73 Cal.App.3d 611, 621). We think that the authorities cited above clearly indicate that it was constitutionally proper for the State Commission in denying Briggs' permit to rely on the Department's expression of interest in Briggs' property.

Briggs' contentions also ignore the fact that the State Commission's denial of her permit was based on grounds totally independent of the Department's interest in purchasing her property. The court so found and the record indicates that the State Commission's denial was also based on: 1) the need for preserving its planning options as to coastal parks, independent of the purchase; and 2) in the absence of acquisition to consider the effect of Briggs' entire plan on the development of the area. Both of these were proper and consistent with the statutory mandate of the "permanent protection" of the remaining

natural and scenic resources of the coastal area and preserving its amenities and aesthetic values (Pub. Resources Code, §§ 27001, 27302, 27402; Coastal Southwest Dev. Co. v. California Coastal Zone Conservation Com., 55 Cal.App.3d 525, 532-536). Coastal Southwest, at page 537, also approved the consideration of the cumulative and overall impact of separate phases of an overall project. The protection of open space by limiting private use was aptly explained as to the private operation of a country club and golf course by this court (Division One) in Friedman v. City of Fairfax, 81 Cal.App.3d 667, at page 677. "While a conceived objective of preserving a scenic, historical and singularly desirable open-space resource may result in conferring a public *benefit,* such an otherwise valid purpose and attendant result is not the equivalent of a public *use* requiring compensation."

Thus, pursuant to the holding of this court in City of Walnut Creek v. Leadership Housing Systems, supra, 73 Cal.App.3d, page 621, the permit denial was based on several independent reasons and, therefore, could not provide a basis for the inverse condemnation judgment. Nor is there any merit to Briggs' attempt to distinguish City of Walnut Creek, supra, on grounds that the State Commission's decision (unlike that of the City of Walnut Creek) was not based on an objectively ascertainable standard. In CEEED v. California Coastal Zone Conservation Com., supra, 43 Cal.App.3d, pages 325-327, the court compared the standards of a number of zoning ordinances with the 1972 Act and concluded that the standards under the Act were sufficient and dictated by the very nature of

the legislative goals which also required the vesting of considerable discretion in the State Commission.

Briggs also argues that liability was established, as the Department's expression of interest was a "substantial contributing cause" of the damage. Van Alstyne, however, concludes that one of the limitations of the "substantial contributing clause rule" is the exclusion of non-physical consequential damages (Van Alstyne, "Inverse Condemnation: Unintended Physical Damage," 20 Hastings L.J. 431, 434-435 et seq.).

The State Commission's denial of the permit for reasons independent of the Department's acquisitory interest are beyond attack, as indicated above in footnote 3, page 5, and do not, as a matter of law, support the trial court's conclusion of inverse condemnation.

Briggs further argues that her cause of action is supported by Klopping v. City of Whittier, 8 Cal.3d 39. In Klopping, the City of Whittier had actually initiated condemnation proceedings but then dismissed the action when it become involved in other litigation that jeopardized the funding for the property. The city's resolution authorizing the dismissal of the condemnation action simultaneously declared the city's firm intention to reinstitute the condemnation proceedings when and if the other litigation was terminated in the city's favor. Our Supreme Court held (at p. 52) that the property owner was entitled to maintain an inverse condemnation action if: 1) the public authority acted unreasonably in the precondemnation activities, either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unrea-

sonable conduct prior to condemnation; and 2) as a result of the public authority's action the property suffered a diminution of value. The court expressly indicated in footnote 5, at page 52: "Only in unusual circumstances would an announcement of intent to condemn constitute a de facto taking."

The general principles announced in Klopping, supra, were further defined and refined in Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110. In rejecting an argument based on Klopping, substantially identical to that made by Briggs here, our Supreme Court said at pages 120-121: "The deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer. The Legislature has attempted to alleviate the problem by authorizing the adoption of long-range plans for orderly progress. Thus, it has provided not only for the adoption of general plans but also regional plans (§ 65060 et seq.), specific plans (§ 65450 et seq.), district plans (§ 66105 et seq.), and a comprehensive plan for the conservation of San Francisco Bay (§ 66650 et seq.). In addition, the voters recently passed an initiative measure providing the mechanism for adoption of plans to preserve and protect the state's coastline (Pub. Resources Code, § 27000 et seq.).

"If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land. We indulge in no

hyperbole to suggest that if every landowner whose property might be affected at some vague and distant future time by any of these legislatively permissible plans was entitled to bring an action in declaratory relief to obtain a judicial declaration as to the validity and potential effect of the plan upon his land, the courts of this state would be inundated with futile litigation. It is clear, under all the circumstances, that plaintiff has not stated a cause of action against the county defendants for either declaratory relief or inverse condemnation."

The trial court's finding that the State Commission's designation of the Briggs property for acquisition merely confirmed the state's pre-existing intent[8] to acquire the property contravenes the above quoted portion of Selby. Nor can the Department's indication of its interest in the Briggs property be equated with the "intent to condemn" that under unusual circumstances could constitute a de facto taking under Klopping, supra.

Pursuant to the applicable statutes, the Department was able only to express its interest in the Briggs property. It was required to proceed in accordance with the Property Acquisition Law (commencing with Gov. Code, § 15850), and could not consummate the purchase of any property with funds from the 1974 act, unless the property was also approved by the State Park and Recreation Commission (Pub. Resources Code, § 5096.88) and the Secretary for Resources (§§ 5096.90, 5096.91), and until the Legislature and Governor had approved an appropriation of funds

[8]The record indicates that the State Public Works condemnation resolution was not passed until three years after the State Commission's denial of the permit.

(§ 5096.91). Public Resources Code section 5096.94 also specifies that "Acquisition for the state park system by purchase or by eminent domain shall be under the Property Acquisition Law . . . notwithstanding any other provision of law." Government Code section 15855, subdivision (a) declared, so far as pertinent, that "the State Public Works Board is the only state agency that may exercise the power of eminent domain to acquire property needed by any state agency for any state purpose or function."[9]

Government Code section 15853 provides, so far as pertinent that "(b) Where moneys are appropriated . . . such moneys shall be expended in accordance with the provisions of this part, notwithstanding any other provisions of law." This provision clearly contemplates Public Works Board determination of the desirability of purchase, even *after* an appropriation is made. Thus, Government Code section 15860 explicitly states, so far as pertinent, that "Any appropriation for the acquisition of real property pursuant to this part may be expended for the payment of all costs and expenses, including . . . the fees and expenses of appraiser . . . necessarily incurred in the examination, *and the determination of the suitability of any real property to be acquired or under consideration for acquisition . . .*" (emphasis added). Thus, as a matter of law, at all times here pertinent, no action by the Department alone could give rise to inverse condemnation liability.

[9]We recognize that this provision became effective on July 1, 1976. The fact that prior thereto the Department had statutory authority to condemn property (former Gov. Code, § 54093) is of no significance as under the then applicable procedures, that authority could be exercised only pursuant to the Property Acquisition Law. Section 5096.94, quoted above, so stated. The then applicable provision of the Property Acquisition Act, former Government Code section 15855, then required a resolution by the Public Works Board.

Further, the trial court here made no findings concerning unreasonable precondemnation activity. Such findings are necessary before liability can be imposed on the basis of Klopping, supra, 8 Cal.3d 39 (Elgin Capital Corp. v. County of Santa Clara, 57 Cal.App.3d 687). In fact, the court could not have made such findings. The evidence, as a matter of law, establishes that there was no unreasonable period of delay between the passage of the condemnation resolution in September 1976 and the filing of the condemnation action on December 31, 1976. Code of Civil Procedure section 1245.60 requires the filing of the condemnation action within six months of the adoption of the resolution of necessity.

Briggs, however, also argues that the Department's activities in the context of the 1974 Bond Act constituted a de facto taking or justified damages under Klopping, supra. Identical contentions were rejected in Helix Land Co. v. City of San Diego, 82 Cal.App.3d 932, 945-948. In City of Walnut Creek v. Leadership Housing Systems, supra, 73 Cal.App.3d, page 623, this court concluded that the period of time necessary for the sale of bonds, the appraisal of the property, and negotiations with the landowner did not constitute unreasonable delay. In doing so, Justice Sims observed, at pages 622-623: "If calling a bond election and urging passage to secure funds for a public purpose constituted a taking, the agency so acting would be subject to suit whether or not the issue carried. The expression of political preference cannot be so burdened." The trial court found that the delay here was precisely for the time required for the passage and implementation of the 1974 Bond Act.

As we have concluded that there is no basis for liability in inverse condemnation, we need not reach the remaining issues raised by the appeal and those raised by the cross-appeal.

The judgment is reversed. Each party to bear its own costs on appeal.

Rouse, J. and Miller, J., concurred

Appendix B

ORDER DENYING REHEARING

In the Court of Appeal
of the
State of California

First Appellate District

Division Two

1 Civil No. 44189
(Sup. Ct. No. 71974)

Mitzi S. Briggs,
Plaintiff and Appellant,
vs.
State of California, acting by and through the Department of Parks and Recreation,
Defendant and Appellant.

[Filed Nov. 29, 1979]

The Court:

The petition for rehearing is denied.*

Dated: November 29, 1979

TAYLOR, P. J.
Presiding Justice

*This Order denying rehearing was made concurrently with the modification of the opinion to its present form.

Appendix C

ORDER DENYING HEARING

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Jan. 24, 1980

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. 44189

Briggs

vs.

State of California

Respectfully,

G. E. BISHEL
Clerk

Appendix D

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1st Civil No. 44189

In the Court of Appeal
State of California

First Appellate District

Division Two

Mitzi S. Briggs,
Plaintiff, Respondent and
Cross-Appellant,

vs.

State of California, etc.,
Defendant, Appellant and
Cross-Respondent.

[Filed Mar. 20, 1980]

Notice is hereby given that Respondent and Cross-Appellant Mitzi S. Briggs, hereby appeals to the Supreme Court of the United States from the decision of the California Court of Appeal entered in this action on October 30, 1979, and as to which the California Supreme Court denied hearing on January 24, 1980.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

JESS S. JACKSON
GIDEON KANNER
By /s/ JESS S. JACKSON
Attorneys for Respondent and
Cross-Appellant, Mitzi S. Briggs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF SAN MATEO

The undersigned, being duly sworn, deposes and says: I am employed in the County of San Mateo, California. I am over the age of eighteen years and not a party to the within entitled action. My business address is 180 Park Road, Burlingame California 94010. On March 17, 1980, I served the attached NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the attorneys of record for Appellant and Cross-Respondent, State of California, in this action, by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at Burlingame, California, addressed as follows:

George Deukmejian, Attorney General
N. Gregory Taylor, Assistant Attorney General
Richard C. Jacobs, Deputy Attorney General
6000 State Building
San Francisco, CA 94102

MARCYL SEIDSCHER
Marcyl Seidscher

Subscribed and sworn to before
me this 17th day of March, 1980

PATRICIA ANN GOOD
Notary Public in and for said
County and State

[Seal]

Appendix E

FINDINGS OF FACT

Superior Court of the State of California
for the County of Monterey

NO. 71974

Mitzi S. Briggs,
Plaintiff,

vs.

State of California, acting by and through the Department of Parks and Recreation, et al.,
Defendants.

[Filed June 27, 1977]

1. Since July 22, 1963, plaintiff, Mitzi S. Briggs, (hereafter "Briggs") has been and now is the owner in fee simple of certain real property (hereafter "subject property") consisting of approximately 35.6 acres of raw undeveloped land located on the coast of the Pacific Ocean, in Monterey County, State of California, as more particularly described in Exhibit A to the Complaint herein.

2. At all times mentioned hereto, the State of California was and is a public governmental entity possessing the power of eminent domain and authorized to acquire private property for public use by negotiation, condemnation, and the exercise of eminent domain.

3. In October, 1972, Briggs obtained building permits (Nos. 23822, 23883, 23884 from the County of Monterey for development of three small residential homes on the subject property.

4. Soon after receipt of the building permits on October 30, 1972, and prior to November 8, 1972, Briggs commenced construction on the subject property, including commencement of excavations for footings, and placements of concrete foundations. On March 19, 1973, two new permits for different and much larger houses were issued upon cancellation of the earlier permits.

5. On April 4, 1973, Briggs applied to the County of Monterey for approval of a "Minor Subdivision" development on the subject property. The application stated that the property would be used for three single family residences.

6. On April 16, 1973, Briggs filed an application for development permit from the Central Coast Regional Commission (hereafter "Regional Commission") of the California Coastal Zone Conservation Commission (hereafter "State Commission"). Briggs' application before the Regional Commission requested a development permit for the construction of three (3) single family residences and accessory structures with rural standard residential service road and underground utilities and sanitary systems on the subject property as approved by the County of Monterey under the new building permits issued for two of the three houses on March 19, 1973, (Monterey County Building Permits No. 24115, 24156, for houses nos. 2 and 3).

7. In early 1973, Briggs filed for an exemption from the Regional Commission for construction of said three residences.

8. On May 7, 1973, Mr. Olney Smith, Executive Director of the Regional Commission executed a "Summary Report Form-Permit" related to the Briggs development permit application. That Summary Report recommended that Briggs proposed development (1) conformed to zoning; (2) would not have any substantial adverse environmental or ecological effect: (3) was consistent with the Coastal Act objective; (4) would have no significant effect on the environment; (5) would not require a two-thirds (2/3rds) vote for approval since construction of the three residences would have little effect on the area; a conclusion confirmed through discussions with officials of the State Department of Parks and Recreation. The Staff Report recommended that the Briggs development permit be granted.

9. For several years prior to 1971 the State of California Department of Parks and Recreation had been planning to acquire the subject property as necessary for public use, to wit, open space and Carmel Beach State Park expansion and development.

10. At some time after May 7, 1973, and prior to May 17, 1973, Mrs. Victoria Gibson, a then Commissioner of the Regional Commission, telephoned Mr. William Penn Mott, Jr., then Director, Parks and Recreation, State of California. The purpose of Mrs. Gibson's telephone call was to inquire as to whether the State of California Department of Parks and Recreation had any interest in acquiring the subject property, prior to considering Briggs' development

permit application. Mr. Mott stated that the State of California was interested in acquiring the Briggs property. Mr. Mott further volunteered to communicate that interest to the Regional Commission, and in particular Mr. Olney Smith, its Executive Director.

11. On May 17, 1973, Mr. William Penn Mott, Jr., then Director of the Parks and Recreation, State of California, sent a Western Union telegram to Mr. Olney Smith, Executive Director of the Regional Commission, which was received by that Regional Commission on May 21, 1973. The telegram stated "The California Department of Parks and Recreation considers the Briggs property desirable as an addition to the existing Carmel River State Beach property."

12. On May 18, 1973, Mr. Milton Frincke, District Superintendent of the Department of Parks and Recreation, Operations Division, District 4, executed and sent a letter to Mr. Olney Smith, Executive Director of the Regional Commission, which was received on May 21, 1973, which stated "We are very concerned about the possibilities of a proposed large scale development on the Briggs property, adjacent to the Carmel River State Beach. This is immediately south of Carmel Meadows. When plans are proposed, we would like to comment."

13. On June 13, 1973, Mr. Michael Miller, a member of the staff of the Regional Commission telephoned Mr. Harmon Rowe who was responsible for acquisitions at the Department of Parks and Recreation, to obtain confirmation of the State's intent to acquire the subject property as expressed in Mott's telegram. Mr. Rowe stated that he

had recommended to Mr. Mott that the Briggs' property be acquired, but that he would confirm this matter and telephone back. Later, that same day, Mr. Rowe telephoned back Mr. Miller and informed Mr. Miller that Mr. Mott had said that the property was desirable, that the effort was being made to budget the acquisition, and that the telegram was written confirmation of those facts.

14. On June 18, 1973, the public hearing on the Briggs' Development permit application was held, at which time Mr. Olney Smith, on behalf of the staff of the Regional Commission, recommended denial of the Briggs' application because of the State's interest in acquiring the subject property. The staff recommendation was announced prior to any public testimony regarding the Briggs' application.

15. On June 18, 1973, the Regional Commission passed Resolution No. 78-88 denying Briggs' development permit application for the following reasons:

WHEREAS, this commission finds that said development will have a substantial adverse environmental and ecological effect and is not consistent with the findings and declarations set forth in Public Resources Section 27001 and is not consistent with the objectives set forth in Public Resources Code Section 27302 in that:

> "(1) the site of the development forms a scenic and physical link between Point Lobos and Carmel Beach, which are property of the State of California, and (2) the site of the development is usable for public recreation and the state has expressed an interest in budgeting its acquisition as a priority item; and (3) permanent protection of the remaining natural and scenic resources of the coast zone will be of

permanent concern to the ultimate California Coastal Zone Conservation Plan."

16. The single and sole reason for the Regional Commission's denial of the Briggs' development permit was the State of California's expressed interest in acquiring the subject property.

17. On June 19, 1973, Mr. Olney Smith executed and sent a letter to Mr. Marvin Weiner, a lot owner in Carmel Meadows, a subdivision adjacent to the subject property, in which he stated that "the Commission denied the application for permit based upon the fact that the State Department of Parks and Recreation has indicated interest in the purchase of all or part of the property, which is a connecting physical and scenic link between the Carmel River Beach Park and Point Lobos."

18. On June 19, 1973, a newspaper article appeared in the Monterey Peninsula Herald which accurately quoted the agency staff of the State Department of Parks and Recreation as being interested in buying the subject property for a state park if voters approved a 1974 bond issue, and which accurately quoted Mr. Olney Smith as saying that the site forms a "scenic and physical link" between Point Lobos and Carmel and is a natural park resource.

19. On June 20, 1973, a newspaper article appeared in the San Francisco Examiner which accurately stated that the California Parks and Recreation had indicated its interest in acquiring the subject property.

20. On June 29, 1973, Briggs appealed to the State Commission, from the Regional Commission's denial of her development permit application.

21. On July 18, 1973, Mr. Kenneth Madsen, an attorney for Mrs. Briggs, met with Mr. Olney Smith who then stated to Mr. Madsen that the "sole reason" and "single factor" for the Regional Commission's denial of the Briggs' application was the May 17, 1973, telegram of Mr. Mott and the State's intent to acquire the subject property expressed therein, and that said expressed intent took the matter out of the hands of the Regional Commission. Mr. Olney Smith further stated to Mr. Madsen that Briggs' only remedy was inverse condemnation.

22. Prior to August 8, 1973, the staff of the State Commission prepared a document entitled "Appeal Summary" regarding the Briggs' development permit appeal. That "Appeal Summary" stated, inter alia, that "the property provides a physical and scenic link between Point Lobos State Reserve and Carmel River State Beach. The State has expressed interest in purchasing this property."

23. Prior to August 8, 1973, the staff of the State Commission prepared a document entitled "Staff Recommendation" regarding the Briggs' development permit appeal. That "Staff Recommendation" recommended denial of the Briggs' development permit, stating as its reason that: "1. Open Space Use. The parcel is one of two privately-owned coastal areas between Point Lobos and the mouth of the Carmel River. The California Department of Parks and Recreation considers the property desirable as an addition to the Carmel River State Beach property.

24. On August 8, 1973, the Coastal Commission denied Briggs' development permit appeal for the reasons stated in the "Staff Recommendation."

On September 7, 1973, Joseph Bodovitz, Executive Director of the State Commission notified Mrs. Briggs that her appeal on an application for an exemption had been denied because she had not obtained building permits for the projects for which she claimed vested rights prior to the effective date of the act, and the expenditures made were not in reliance on the plans for which building permits had been issued prior to November 8, 1972.

No mandate action was filed challenging the Commission's decisions.

25. The State of California Department of Parks and Recreation's expressed interest in acquiring the subject property for public use substantially contributed to the State Commission's denial of Briggs' development permit appeal.

26. Since the State intended to acquire the subject property for public use, further attempts to privately develop the subject property would have been an idle act.

27. On September 4, 1973, Mr. Milton Frincke, District Superintendent of the Department of Parks and Recreation, executed and sent a letter to Mr. William Mott which stated "We suggest you send a letter to both the Central Coastal Committee and the State Conservation Committee expressing a continued interest in the Briggs' property. I realize this is a repetition of your former statement but will assist us and local citizens in preserving this key area in open space and for possible future addition to the Carmel River State Beach."

28. On September 13, 1973, Mr. Mott executed and delivered a letter to the Regional Commission and Coastal

Commission which confirmed the Department of Parks and Recreation's continued interest in acquiring the subject property as an addition to the Carmel River State Beach subject to the availability of funds if the 1974 Bond Act passes.

29. On September 28, 1973, Mr. William Penn Mott, Jr., executed and sent a letter to Mrs. Briggs stating in part "in reply to an inquiry from the Coastal Zone Conservation Commission this department [Parks and Recreation] informed the Commission that it does have an interest in acquiring your property in the Carmel area and will take further steps to do so when funds are available for such purpose."

30. On November 7, 1973, the Monterey County Board of Supervisors approved a Briggs' Minor Subdivision Application for the subject property.

31. On October 31, 1973, Lt. Governor Ed Reinecke executed and sent a letter to Briggs, stating in part that he had been in contact with Mr. William Mott and that the State of California was very much interested in purchasing the subject property.

32. In 1973, 827 of 945 development permits and 52 of 83 exemption applications to the Regional Commission were approved.

33. In January, 1974, the Regional Commission filed and served a lawsuit against Briggs in the County of Monterey, action No. M6292, consisting of a Complaint for Injunction and Civil Remedies and Civil Penalties and related Notice of Pendency of Action and Summons. Said

suit sought, among other remedies, a preliminary and permanent injunction restraining Briggs from selling, leasing, renting or in any way transferring any title in fee or otherwise on those parcels of land created by the Briggs Minor Subdivision.

34. On May 9, 1974, Briggs and her attorney met with Mr. William Mott and Mr. Les McCargo of the State of California Department of Parks and Recreation. At that time Briggs and her attorneys advised Mr. Mott that the State of Caifornia's conduct had prevented development and viable use of the subject property, and caused financial and economic injuries to Mrs. Briggs. Briggs and her attorneys further informed Mr. Mott that unless the State of California gave some assurances that the property will be directly condemned then she would have to commence an inverse condemnation lawsuit against the State of California, among other legal remedies. Mr. Mott then assured Briggs that the State of California Department of Parks and Recreation had interest in acquiring the subject property for a number of years and that it was among the top properties in the State of California for public acquisition. Mr. Mott then assured, represented to and promised Briggs that the only condition to the State's acquisition of the subject property was passage by the California voters of the June bond issue (State Beach, Park Recreation and Historical Facilities Bond Act of 1974) and that if said Bond Act passed the State would promptly acquire the subject property and that all other procedural steps by the State would be mere formalities.

35. On May 9, 1974, after the meeting referred to above in No. 34, Mr. Mott executed and delivered a letter drafted

by Mrs. Briggs' attorneys to Mrs. Briggs which stated that "The State of California, Department of Parks and Recreation, intends to acquire, by negotiation or condemnation, fee title to your property above referenced if the pending ballot measure authorizing the issuance of Bonds is passed by the electorate this June, 1974. In the event said bond issuance is approved, the State Park and Recreation will then adopt a resolution authorizing said acquisition, and we will commence appraisal procedures and we will negotiate with you to acquire said property. . . . As we have previously stated, we have been interested in acquiring this property for many years, but have been unable to do so for the sole reason that funds to acquire the same have been unavailable. If the Bond issue passes, this property will be included for prompt acquisition inasmuch as sufficient funds will then be available when the bonds are marketed."

36. In reliance on the State's representations and promises of May 9, 1974, Briggs deferred commencement of legal proceedings for mandamus, inverse condemnation, declaratory relief and other relief against the State of California.

37. In reliance on the State's representations and promises of May 9, 1974, Briggs ceased further attempts to develop any economic use of the subject property.

38. On June 4, 1974, the California electorate passed the Bond issue referenced in Mr. Mott's letter to Briggs of May 9, 1974, known as the State Beach, Park, Recreational and Historical Facilities Bond Act of 1974.

39. On July 12, 1974, the State Park and Recreation Commission passed Resolution 74-93 stating: "Be it resolved that the State Park and Recreation Commission direct a study involving State funds under the State Beach, Park, Recreational and Historical Facilities Bond Act of 1974, of a project involving an addition to the Carmel River State Beach categorized under, "Inholdings and Additions to Existing State Park Units" and "Be it further resolved that the Commission recommends said project subject to the procedures of the Bond Act; also, subject to such implementation as is necessary by the Director of Parks and Recreation.

40. On July 23, 1974, Mr. William Mott executed and sent a memorandum to Mr. Norman B. Livermore, Secretary for Resources, State of California, which: (1) designated the Briggs' property within the acquisition program derived from the State Beach, Park, Recreational and Historical Facilities Bond Act of 1974; and (2) designated funds for acquisition of the Briggs' property and (3) stated the "scope" of the project as "to insure the continued scenic beauty of this green space, provide public access to the public beach, and to tie together portions of the Carmel River State Beach separated by a physical barrier;" and (4) stated that the recommended future State development "would include hiking trails, scenic overlook and possible picnic area development;" and (5) Stated that the Briggs property "is presently threatened with residential development" and (6) stated that "the outstanding scenic qualities of this parcel make it a desirable addition to the Carmel River State Beach, Point Lobos complex" and (7) stated that the operational effectiveness of the park unit would

be enhanced by merging the separated sections of Carmel River State Beach. The result would be more effectively patrolled and a considerable time savings in maintenance and concluded (8) "this property is threatened by development and should be preserved for public use. This property will add needed upland to an existing State Beach, supplying access to the beach and to scenic overlook areas."

41. On July 24, 1974, a newspaper article appeared in the Monterey Peninsula Herald which accurately quoted Mr. Frank Bechler, administrative aide to Mr. William Mott, that calling for the study of the subject property was tantamount to including Briggs' property among the acquisition projects to be funded by the 1974 Bond Act, and that State officials had made a commitment to purchase Briggs' property.

42. On September 27, 1974, the Governor signed Chapter 1484, Statutes of 1974, Item 410.7B(ii) authorizing $1,750,000.00 for acquisition of the subject property from the State Beach, Park, Recreation and Historical Facilities Fund of 1974. Subsequently:

a) Efforts were made to find a manageable method with which to accomplish the prescriptive easement requirement.

b) After January 1, 1975, a change of administration occurred with the election of a new Governor and appointment of new Secretary of Resources and Director of Parks and Recreation. Acquisition projects then in progress were held in abeyance pending review by Secretary of the Resources Agency.

c) In January of 1975, review of the Department of Parks and Recreation's budget estimate for acquisition of the subject property was requested of Real Estate Services Division of General Services.

d) After several months of meetings to iron out the difficulties with the prescriptive easement investigation procedure, the legislature changed the procedure, effective May 2, 1975.

e) The acquisition request by the Department of Parks and Recreation to the Department of General Services to commence acquisition procedures regarding the Briggs' property was made in May, 1975, after the passage of the legislation which changed the provisions regarding prescriptive easement investigations.

f) Upon passage of the bill modifying the prescriptive easement investigation procedures, the General Services Department began the implied dedications study of all the property provided for in the appropriations bill as well as all previous projects augmented by Chapter 1521, Stats. 1974.

g) The plaintiff's inverse condemnation action was filed on August 2, 1975.

h) On October 28, 1975, the prescriptive easement investigation as to the Briggs' property was concluded. The State could not commence the appraisal phase of the acquisition until after the prescriptive easement investigation was concluded.

i) In December of 1975, a contract was signed for an independent appraisal of the subject property.

j) The appraisal was originally scheduled for completion by May, 1976.

k) Due to the appraiser's trial schedule, an extension was granted to July 1976. That appraisal was actually delivered on June 16, 1976.

l) On August 30, 1976, the Public Works Board authorized the Department of General Services to negotiate for the property and approve an augmentation to the amount previously budgeted, because the appraiser's value was higher than that previously budgeted.

43. Since at least May, 1973, the State of California Department of Parks and Recreation has intended to acquire the subject property for public purposes.

44. The State's earlier intent to acquire the subject property was confirmed and ratified by subsequent conduct and statements by the following, among other things:

(a) On June 4, 1974, the 1974 Park Bond Act was approved by the California electorate. In December, 1975, the State Commission published a document entitled "California Coastal Plan, California Coastal Zone Conservation Commission" which designated (at pp. 344-345) Briggs' subject property for acquisition and stated as to said property, "Acquire this 35.6 acres undeveloped meadow as an addition to Carmel River State Beach."

(b) In March, 1976, the State of California published a document entitled "Recommended Coastal Property for Public Acquisition," which indicated (at page 27 and Map 10) the Briggs' subject property for acquisition by the

State of California as a "buffer, view protection for Pt. Lobos Reserve" and further indicated an amount for preliminary funding in the sum of $1,500,000.00 already existing in Department of Parks and Recreation funds.

(c) The State of California obtained an appraisal dated June 16, 1976, on the subject property.

(d) On September 27, 1976, the State of California Public Works Board passed a resolution authorizing the acquisition of the subject property.

(e) On or about December 31, 1976, the State of California filed a direct condemnation action against the subject property.

45. At all times relevant hereto Mrs. Briggs and any listing broker of the subject property would be required to fully inform a prospective purchaser of all material facts affecting the subject property, including the State of California's statements and conduct related thereto.

46. After May, 1973, the State's denials of Briggs' applications caused the subject property to be unmarketable in the open market in relation to its fair market value, or otherwise.

47. After May, 1973, the State's acquisition activities caused the subject property to be unmarketable in the open market in relation to its fair market value, or otherwise.

48. After May, 1973, the State's denials of Briggs' applications and acquisition activities caused the subject property to be unmarketable in the open market in relation to its fair market value, or otherwise.

49. After May, 1973, the State's denials of Briggs' applications caused the subject property to have no viable economic use or return, in relation to its value, or otherwise.

50. After May, 1973, the State's acquisition activities caused the subject property to have no viable economic use or return, in relation to its value, or otherwise.

51. After May, 1973, the State's denials of Briggs' application and acquisition activities caused the subject property to have no viable economic use or return, in relation to its value, or otherwise.

52. After May, 1973, the State's denials of Briggs' applications blocked and prevented any higher use or return on the subject property or the proceeds from a fair market sale thereof.

53. After May, 1973, the State's acquisition activities blocked and prevented any higher use or return on the subject property or the proceeds from a fair market sale thereof.

54. After May, 1973, the State's denials of Briggs' applications and acquisition activities blocked and prevented any higher use or return on the subject property or the proceeds from a fair market sale thereof.

55. As a direct and proximate result of the State's assurances, representations and promises to acquire the subject property from and after May, 1974, Briggs has incurred substantial economic and financial losses and damages to the subject property, and delay in payment of just compensation therefor.

56. The State's denials of Briggs' application for a development permit and exclusions were, and each of them was, pursuant to a policy to preserve the subject property in its then undeveloped status pending its acquisitions.

Dated: June 24, 1977

RALPH M. DRUMMOND

Judge of the Superior Court

Appendix F

CONCLUSIONS OF LAW

Superior Court of the State of California
for the County of Monterey

NO. 71974

Mitzi S. Briggs,
Plaintiff,
vs.
State of California, acting by and through the Department of Parks and Recreation, et al.,
Defendants.

[Filed June 27, 1977]

1. On March 27, 1975, the State of California caused and accomplished a de facto taking of the subject property entitling Briggs to judgment in inverse condemnation for said taking, and to (1) just compensation for said taking as measured by the fair market value of the subject property as of March 27, 1975, for its highest and best use, and (2) for interest thereon at the prevailing fair market rate from said date of taking until paid. The determination of fair market value as of that date properly includes consideration of the existence and permit requirements of the California Coastal Zone Conservation Act of 1972, but ignoring Briggs' permit applications to the Regional and Coastal Commissions and the denial of those applications; and further ignoring any interest of the State of California

in acquiring said property; and further ignoring any interest by the Regional or State Coastal Commission in recommending the subject property for acquisition.

2. On and after August 8, 1973, the State of California interfered with and blocked Briggs use, development and economic return on the subject property entitling Briggs to judgment in inverse condemnation (1) for damages incurred by Briggs during the period beginning August 8, 1973, to the date of taking, March 27, 1975, and (2) for interest thereon at the prevailing fair market rate from the date of said taking (March 27, 1975) until paid.

Dated: June 24, 1977

RALPH M. DRUMMOND

Judge of the Superior Court

CERTIFICATE OF MAILING

I do hereby certify that I am not a party to the within stated cause, and that on June 27, 1977, I deposited true and correct copies of attached document, each in sealed envelopes with postage thereon fully prepaid, in the mail at Salinas, California, directed to each of the following named persons at their respective addresses, as hereinafter set forth:

Leonard M. Sperry, Jr., Esq.
Deputy Attorney General
Department of Justice
6000 State Building
San Francisco, CA 94102

Jess Jackson, Esq.
Attorney at Law
180 Park Road
Burlingame, CA 94010

Dated: June 27, 1977

ERNEST A. MAGGINI, County Clerk and Clerk of the Superior Court for the County of Monterey.

By /s/ Beverly Clausen
Deputy

SELECTED SECTIONS OF CALIFORNIA GOVERNMENT CODE

Appendix G

§ 15850—This part may be cited as the Property Acquisition Law.

§ 15851—As used in this part, "board" means the State Public Works Board.

§ 15852—The State Public Works Board has all the duties, powers, purposes, responsibilities, and jurisdiction of the Property Acquisition Board and whenever by law a duty or jurisdiction is imposed or authority conferred upon the Property Acquisition Board or upon any of its officers or employees such duty, jurisdiction, and authority are vested in the State Public Works Board with the same force and effect as if the title of the State Public Works Board had been specifically set forth therein.

§ 15853—The board shall select and acquire, in the name and on behalf of the State, suitable and adequate real property for such purposes as may be specified in the legislation making funds available for such acquisition. Where moneys are appropriated by the budget act for any fiscal year or by any other act for the acquisition of land or other real property, subject to the provisions of the Property Acquisition Law, such moneys and acquisitions shall be subject to the provisions of this part and said moneys shall be expended in accordance herewith, notwithstanding any other provisions of law.

The board may acquire any interest in real property pursuant to this part which it deems advisable.

The board may acquire furnishings which the owner thereof agrees to sell and which are contained within improvements acquired by the board. Cost of acquisition of such furnishings shall be charged to the appropriation available for acquisition of the real property.

§ 15854—Property shall be acquired pursuant to this part by condemnation in the manner provided for in Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure, and all money paid from any appropriation made pursuant to this part shall be expended only in accordance with a judgment in condemnation or with a verdict of the jury or determination by the trial court fixing the amount of compensation to be paid. This requirement shall not apply to any of the following:

(a) Any acquisitions from the federal government or its agencies.

(b) Any acquisitions from the University of California or other state agencies.

(c) The acquisitions of parcels of property, or lesser estates or interests therein, for less than five thousand dollars ($5,000), unless part of an area made up of more than one parcel which in total would cost more than five thousand dollars ($5,000) which the board by resolution exempts from this requirement.

(d) Any acquisition as to which the owner and the state have agreed to the price and the State Public Works Board by unanimous vote determines that such price is fair and reasonable and acquisition by condemnation is not necessary.

(e) Any acquisition as to which the owner and the State Public Works Board have agreed to arbitrate

the amount of the compensation to be paid in accordance with Chapter 3 (commencing with Section 1273.01) of Title 7 of Part 3 of the Code of Civil Procedure.

§ 15854.1—The board shall not select or acquire a site for the use of the California State University and Colleges unless, prior to the selection, the trustees have, by resolution, approved of the selection of the site.

§ 15854.5—To promote the safety of students, comprehensive community planning, and greater educational usefulness of state college sites, the Trustees of the California State University and Colleges, before the board acquires title to property for any such site, shall undertake the following action:

Immediately after receiving notice of the proposed acquisition of property which is within two miles, measured by air line, of that point on an airport boundary which is nearest the site, the Trustees of the California State University and Colleges shall notify the Department of Aeronautics, in writing, of the proposed acquisition. The Department of Aeronautics shall make an investigation and report to the trustees within 25 days after receipt of the notice. If the Department of Aeronautics is no longer in operation, the trustees shall, in lieu of notifying the commission, notify the Federal Aviation Agency or any other appropriate agency, in writing, of the proposed acquisition for the purpose of obtaining from the authority or other agency such information or assistance as it may desire to give.

The Trustees of the California State University and Colleges shall investigate the proposed site and within 30 days after receipt of the notice shall submit to the board a written report and its recommendations concerning acquisition of the site. The board shall not acquire title to the property until the report of the trustees has been received. If the report does not favor the acquisition of the property for a state university or college site or an addition to a state university or college site, the board shall not acquire title to the property until 30 days after the trustees' report is received and until the trustees' report has been read at a public hearing duly called after 10 days' notice published once in a newspaper of general circulation within the county in which the property is located.

§ 15855—Before commencing condemnation proceedings the board shall adopt a resolution declaring that public interest and necessity requires the acquisition, construction, or completion by the State of the improvements for which the real property or interest therein is required and that the real property or interest therein described in the resolution is necessary for the improvement.

The resolution of the board shall be conclusive evidence:

(a) Of the public necessity of the proposed public improvement.

(b) That the real property or interest therein is necessary for the improvement.

(c) That the improvement is planned or located in a manner which will be compatible with the greatest public good and the least private injury.

§ 15856—In any condemnation proceeding brought for the acquisition of real property pursuant to this part, the use for which the property is condemned shall be deemed a public use more necessary than any other public use to which the property is devoted at the time the action is commenced.

§ 15857—The board may agree with the owner of part or all of the property to be condemned as to the compensation to be paid, and may incorporate such agreement in a stipulation to be filed in the condemnation proceeding.

§ 15858—Whenever property which is devoted to or held for some other public use for which the power of eminent domain may be exercised is taken for state purposes pursuant to this part, with the consent of the person or agency in charge of such other public use, the board may condemn other real property and exchange it with such other person or agency for the real property to be taken for state purposes.

Transfer of the property so acquired shall be made in accordance with the stipulation entered into pursuant to Section 15857.

§ 15859—The board may abandon any condemnation proceeding. Nothing in this part extends the time specified in Section 1255a of the Code of Civil Procedure for the abandonment of condemnation proceedings.

§ 15860—Any appropriation for the acquisition of real property pursuant to this part may be expended for the payment of all costs and expenses, including the cost of investigation and surveys, the fees and expenses of

appraisers and expert witnesses, and the cost of title searches necessarily incurred in the examination, and the determination of the suitability of any real property to be acquired or under consideration for acquisition, or necessarily incurred in the course of acquisition of any such real property. Claims for such costs and expenses shall be presented by the Director of General Services and shall be paid by the Controller.

§ 15861—Whenever it appears to the satisfaction of the board that any part of the campus of a state college acquired as a site for student housing will, if used for such purpose, interfere with the proper and orderly development of the campus, the board may authorize the use of such site for any other purpose of the state college upon the Trustees of the California State Colleges designating some other part of the campus as a site for the student housing affected.

§ 15862—When real property is acquired by the state pursuant to this part, and until such property is needed for the purpose for which acquired, the jurisdiction over such property is in the Department of General Services. The Director of General Services may transfer jurisdiction of said property to the agency for whose use it was acquired before it is needed for the purpose for which acquired if in his opinion such transfer is in the best interests of the state. The department may lease all or any portion of the property which is not presently needed on such terms and conditions as the director may fix and may maintain, improve, and care for such property in order to secure rent therefrom. The department may remove or demolish buildings or other structures on the property

when it is desirable to do so. It may sell or dispose of the improvements or any materials available upon the demolishing of any building or structure on the property.

§ 15863—The proceeds of such sale shall be deposited in the General Fund. Rentals received by the department, pursuant to Section 15862 shall be deposited in the General Fund and are appropriated to the Department of General Services to maintain, improve, and care for real property acquired pursuant to this part pending the use of such property to further the postwar construction program. Any unneeded balance in the appropriation shall be transferred by the Controller on order of the Director of General Services to the General Fund.

§ 15864—On behalf of the board, the Director of General Services shall file against any appropriation made for expenditure under this part all claims covering expenditures incurred in acquiring real property pursuant to the act by which the appropriation is made, and the Controller shall draw his warrant therefor.

§ 15865—Whenever the board finds that any portion of the funds in any appropriation for the acquisition of real property under this part is unneeded for the acquisition of the site for which such appropriation was made the State Board of Control may, upon the recommendation of the board, authorize the transfer of such unneeded funds to any other appropriation for the acquisition of real property made for expenditure under this part and in augmentation of such other appropriation, except that no part of any appropriation made for expenditure pursuant to this part for the acquisition of a site for the use of an institution, college, school, or other agency within a state

department, shall be transferred to an appropriation for the acquisition of a site for the use of an institution, college, school, or other agency within another state department. For the purposes of this section appropriations for sites for state office buildings, state garages, state warehouses, and official residences are for the use of the Department of General Services.

§ 15866—Without at the time furnishing vouchers and itemized statements, the board may withdraw from any appropriation made for expenditure under this part such sum as may be approved by the Board of Control for use as a revolving fund where payment of compensation or cash advances are necessary.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1678

MITZI S. BRIGGS,
Appellant,

vs.

STATE OF CALIFORNIA, etc.,
Appellee.

Appeal from the Court of Appeal of California
First Appellate District, Division Two

Motion to Dismiss or Affirm

GEORGE DEUKMEJIAN
Attorney General of California

ROBERT L. BERGMAN
N. GREGORY TAYLOR
Assistant Attorneys General

RICHARD C. JACOBS
CHRISTOPHER M. AMES
Deputy Attorneys General

6000 State Building
San Francisco, California 94102
Telephone: (415) 557-0285

Attorneys for Appellee
State of California

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Motion to Dismiss or Affirm

The State of California, appellee herein, respectfully moves this Honorable Court to dismiss the appeal now pending on the following grounds:

1. Jurisdiction does not lie under 28 U.S.C. § 1257(2), since the appellant has not "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States...."

2. Jurisdiction does not lie, since the judgment of the California Court of Appeal rests on an independent and adequate nonfederal ground.

3. The appeal does not raise either a properly presented or a substantial federal question.

In the alternative, the State of California respectfully moves that the Court affirm the judgment of the California Court of Appeal, on the ground that the questions on which the decision of the cause depends are insubstantial, and do not require further argument.

I.

STATEMENT OF FACTS

The California Coastal Zone Conservation Act of 1972 was enacted by the People of the State of California as an initiative measure on November 7, 1972. The Act declared the California Coastal Zone to be a "delicately balanced ecosystem" whose preservation and protection for present and succeeding generations was a matter of paramount concern to the state and nation. Former Public Resources Code § 27001.[1]

The 1972 Act created the California Coastal Zone Conservation Commission and six regional commissions; it directed them to undertake whatever studies were necessary to determine the proper planning principles and assumptions needed to ensure the conservation and protection of California's coastal zone resources. Based upon those studies, the Commissions were directed to develop and adopt a California Coastal Zone Conservation Plan for submission to the Legislature. Former Public Resources Code §§ 27200-27201; 27300-27304; 27320. The Act required the Plan to include the Commissions' recommendations for

1. The coastal zone was generally described as extending from the seaward limit of state jurisdiction inland, with some exceptions, to the highest elevation of the nearest coastal mountain range. Former Public Resources Code § 27100. Unless otherwise specified, references in this motion are to California statutes. The 1972 Coastal Act is attached to this motion as Appendix A.

public purchase of private land. Former Public Resources Code § 27304(d).

During the period necessary for preparation of the Plan and consideration of it by the Legislature, the Commissions were granted broad regulatory controls over proposed developments within the permit area of the coastal zone.[2] Any person who wished to perform such a development was required to obtain a permit from the appropriate regional commission; any determination by the regional commission was thereafter subject to *de novo* administrative review on appeal by the state commission. Former Public Resources Code §§ 27400 and 27423.[3] The commissions could approve such an application only if they found that the proposed development would not have a substantial adverse environmental or ecological effect, and would not be inconsistent with the policies and objectives of the Act. Former Public Resources Code §§ 27400, 27423, 27402. The coastal commissions were not given the power of eminent domain by the Act; under California Government Code Section 15855, that power rests only with the State Public Works Board.

The 1972 Act, by its own terms, expired on December 31, 1976. Former Public Resources Code § 27650. Prior to that time, however, the commissions had prepared the required

2. The permit area was defined, with exceptions not pertinent here, as the portion of the coastal zone "lying between the seaward limit of the jurisdiction of the state and 1,000 yards landward from the mean high tide line of the sea . . ." Former Public Resources Code § 27104.

3. The hearing and decision of the state commission "'. . . is binding upon the parties thereto and takes the place of and completely nullifies the former determination of the matter . . . .'" The hearing before the state commission "contemplates not merely a new public hearing, but that all matters involved are to be decided '"anew; afresh; over again."'" *REA Enterprises v. California Coastal Zone Conservation Commission* (1975) 52 Cal. App. 3d 596, 612-613.

California Coastal Plan, including recommendations for purchase of private property, and had submitted it to the California Legislature. The Legislature found that the Plan conformed to the requirements of the 1972 initiative. Public Resources Code § 30002. The Legislature concluded that some of the recommendations of the commissions were appropriate for immediate implementaion, that some of them required further study, and that other similar means were appropriate for implementation. Accordingly, the Legislature enacted the California Coastal Act of 1976 (Public Resources Code §§ 30000 et seq.); the 1976 Act carries out the stated desire of the People of the State of California for a permanent mechanism for the protection of the California coast.

The opinion of the California Court of Appeal correctly states some of the many facts of this case. Juris. St. App., A-3 to A-10. We reiterate and emphasize some of those facts here, however, since they are particularly essential to an understanding of the case.

The appellant acquired the vacant land at issue in this case in 1963 for $1,100,000. She subsequently decided to use the future anticipated profits from a proposed hotel development on the property, to repay an unrelated $5,000,000 loan.

The appellant's property lies within the permit zone established by the 1972 Coastal Act. In early 1973, she applied to the appropriate regional coastal commission for a permit to construct three large single family residences. After the executive director of the regional commission had prepared a staff report tentatively recommending approval of the residences, and before the required public hearing on the application, one of the commissioners of the regional commission contacted the Director of the State of

California Department of Parks and Recreation to determine whether the Department had any interest in purchase of the appellant's property.[4] The Department of Parks and Recreation subsequently sent a telegram to the regional commission stating that the Department "considers the Briggs property desirable as an addition to the existing Carmel River State Beach property." At the time of the telegram, however, the Department did not have either funding or legislative authority to purchase the property.[5]

The regional commission thereafter denied the permit application, and the appellant filed an administrative appeal to the state coastal commission. That commission accepted her appeal, and held a *de novo* hearing on the application. Former Public Resources Code § 27423(c). As

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4. The appellant seeks to pejoratively paint this contact as a "furtive, ex parte conversation . . . ." Juris. St. 13. In fact, the contact was disclosed and discussed during the public hearing on the application, as were the other contacts between the regional commission staff and the Department of Parks and Recreation.

5. As the Court of Appeal explained:

"Pursuant to the applicable statutes, the Department was able only to express its interest in the Briggs property. It was required to proceed in accordance with the Property Acquisition Law (commencing with Gov. Code, § 15850), and could not consummate the purchase of any property with funds from the 1974 act, unless the property was also approved by the State Park and Recreation Commission (Pub. Resources Code, § 5096.88) and the Secretary for Resources (§§ 5096.90, 5096.91), and until the Legislature and Governor had approved an appropriation of funds (§ 5096.91). Public Resources Code section 5096.94 also specifies that 'Acquisition for the state park system by purchase or by eminent domain shall be under the Property Acquisition Law . . . notwithstanding any other provision of law.' Government Code section 15855, subdivision (a) declared, so far as pertinent, that 'the State Public Works Board is the only state agency that may exercise the power of eminent domain to acquire property needed by any state agency for any state purpose or function.'" Juris. St. App., A-19 and A-20.

the California Court of Appeal recognized in its decision, under California law the state commission's proceedings "completely nullify the former determinations of the Regional Commission . . ." Juris. St. App., A-3 n. 2.

After hearing, the state commission denied the permit application, adopting its staff recommendation as its findings. The trial court found that the reasons given by the state commission were in fact the reasons for the denial. Juris. St. App., A-33 (Finding 24). As will be discussed later, those findings clearly establish an independent and adequate non-federal ground for the opinion of the Court of Appeal.

The state commission's findings state the following reasons for its action:

> "1. *Open Space Use.* The parcel is one of two privately-owned coastal areas between Point Lobos and the mouth of the Carmel River. The California Department of Parks and Recreation considers the property desirable as an addition to the Carmel River State Beach property. *Although the State Parks Department does not have a definite commitment to purchase the property, there is clearly a need for preserving the Commission's planning options as to coastal parks in this area.* Because of the manner in which the 3 homes would be spaced along the ocean bluff, construction of the homes would foreclose the possibility of acquiring either all the ocean front property or acquiring only portions and allowing the rest to be developed.
>
> *"Even if the Commission's planning process were to determine the acquisition is not desirable, it is too early in the planning process to decide that development should proceed in the manner proposed by applicant.* It might be preferable to require clustered development on the portion of the property adjoining an existing subdivision, with the remainder of the property left as open space, to maintain as much as possible of the scenic qualities of the property.
>
> "2. *Inducement to Development.* Although the proposed project consists only of the construction of 3 large homes, the applicant's claim of exemption states that the total development will have 2 more stages, 1 of which is a subdivision application in operation and the second of which is a planned unit development currently in the si [sic] stage. Once the 3 homes are built, the property will be foreclosed from any significant open space or recreational use along the ocean front, which will in turn on [sic] that the property will be committed to further development. The road servicing the three homes runs along almost the entire ocean frontage of the property and together with utility extensions would encourage further development." (Emphasis partially added by California Court of Appeal). Juris. St. App., A-4 and A-5.

These findings of the state commission were never challenged within the applicable period of time for review of the decision, and under California law they are now immune from collateral attack in this case. Juris. St. App., A-5 n. 3; *Stockton v. Department of Employment,* 25 Cal. 2d 264, 267-268 (1944).

Prior to and after the denial of the appellant's application, the coastal commissions were preparing the California Coastal Plan. As required by statute, that Plan eventually included recommendations for the permanent protection of the California coastline.[6] The plan recommended the purchase of 154 parcels of privately owned coastal land, distributed along the length of the California

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6. The appellant incorrectly states that "no such plan has been finally adopted." Juris. St. 12 n. 6. The plan itself is part of the record in this case, introduced into evidence by the appellant. Plaintiff's Exhibit 34-B.

coast, including the appellant's property. The total estimated fair market value of the recommended acquisitions was more than $180,000,000.

Following the denial of the permit application, the Department of Parks and Recreation continued to express its interest in possible purchase of the property. In September 1973, the Department wrote that it was interested in possible purchase, but that funds were not available. Juris. St. App., A-5. In May 1974, the Director of the Department met with the appellant and her attorneys, and advised them that the Department was interested in purchase, but that a prerequisite to any determination on the question of purchase was the passage of a bond issue by the California electorate. Juris. St. App., A-6. The Director indicated that other prerequisites to a determination of the question of purchase also involved the adoption of a resolution authorizing acquisition, normal appraisal procedures, and negotiation for purchase. Juris. St. App., A-7. The bond issue was passed by the California electorate in June 1974, and money was appropriated in September 1974 by the California Legislature for the purchase of numerous properties, including the appellant's, subject, *inter alia*, to the usual requirements of the California Property Acquisition Law. See Juris. St. App., A-48 to A-55.

The Court of Appeal opinion details the adminstrative steps which followed. Juris. St. App., A-8 and A-9. The State Public Works Board subsequently authorized acquisition and condemnation, and a direct condemnation action was filed on December 31, 1976.[7] In that action, the State deposited $1,750,000 into Court, and the appellant withdrew

7. California law requires the filing of a *lis pendens* concurrently with the filing of a condemnation complaint. Calif. Code of Civil Procedure § 1250.150.

that amount for her use in June, 1977. That action is still pending in the California Superior Court.[8]

The trial court found that the denial of the permit by the coastal commission had unconstitutionally damaged the appellant's property, and that she was entitled to damages for that denial alone. Juris. St. App., A-46, A-11.[9] The trial court also found that the State had "taken" the appellant's property on March 27, 1975. Juris. St. App., A-11. Judgment was ultimately entered for $6,429,437 against the State. On the State's appeal, the Court of Appeal reversed the judgment in its entirety.

This case thus does not raise the issues suggested by the appellant. It does not involve "private property slated for condemnation which is then delayed . . ." Juris. St. 21. Neither does it involve "precondemnation activities that cause a blighting of property slated for acquisition . . ." Juris. St. 31. In fact, this case involves a permit denial by the state commission under the 1972 Coastal Act, a subsequent recommendation in 1976 for purchase of the appellant's land as part of the Coastal Plan, contemporaneous consi eration of possible purchase by the Department of Parks and Recreation, appropriation of money by the California Legislature, a final determination by the State Public Works Board that the property ought to be condemned for public park purposes, and the filing of a condemnation

8. Trial of that action was stayed by the California Court of Appeal, on the State's petition. The Court of Appeal opinion in that proceeding carefully details the compelling reasons for that stay. That opinion is attached hereto as Appendix B.

9. The trial court, after hearing testimony regarding the appellant's apparently unsuccessful investments in silver commodity straddles, the Tropicana Hotel and Casino in Las Vegas, and the like, awarded $469,000 in damages based on the permit denial. C. T. 849, 854.

action. As demonstrated in Section IV, *infra,* at most it involves a temporary denial of use pending the adoption of a comprehensive plan for the future of the California coastline and pending consideration of a possible recommendation of purchase of the land as part of that plan; it does not involve a denial of use at a time when the State had affirmatively and finally determined to purchase the property. As will also be demonstrated in Section III, *infra,* it also involves a temporary denial of use, on grounds completely apart from any consideration of possible acquisition.

II.

THIS CASE DOES NOT INVOLVE THE VALIDITY OF ANY STATUTE OF THE STATE OF CALIFORNIA, WITHIN THE MEANING OF 28 U. S. C. § 1257(2), AND JURISDICTION THEREFORE DOES NOT LIE OVER THE APPELLANT'S APPEAL.

The Court of Appeal opinion and the appellant's jurisdictional statement make clear that the constitutional validity of the California Coastal Zone Conservation Act of 1972 is not at issue. Instead, the appellant challenges both the administrative decision of the state coastal commission, and what she contends is an unconstitutional course of conduct by several state agencies. Her appeal therefore does not draw "in question the validity of a statute of any state" within the meaning of 28 U.S.C. § 1257(2). Since her constitutional questions "relate primarily, and more substantially, to the propriety of the findings" made by the state coastal commission, the Court lacks jurisdiction over her appeal. *Lerner v. Casey,* 357 U.S. 468, 473 (1958).[10]

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10. The cases cited by the appellant in her jurisdictional statement (Juris. St. 4) are inapposite. Some are cases involving appeals from the federal Courts of Appeals. The cases involving appeals from state court judgments each involved the claimed invalidity of a local ordinance or state statute.

III.

JURISDICTION DOES NOT LIE, SINCE THE JUDGMENT OF THE CALIFORNIA COURT OF APPEAL RESTS ON AN INDEPENDENT AND ADEQUATE NONFEDERAL GROUND.

The appellant seeks review by this Court on the basis of allegedly "inequitable governmental precondemnation activities [which] effect a de facto taking of property slated for condemnation . . ." Juris. St. 21. As we discuss in Section IV of this motion, *infra,* this appeal does not properly present that question. The opinion of the California Court of Appeal, moreover, makes clear that it rests on independent and adequate nonfederal grounds which do not involve the questions raised by the appellant. For this reason, the Court lacks jurisdiction over her appeal. *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 568 (1977).

As previously noted, the California Coastal Zone Conservation Act of 1972 was an interim measure, and it expired by its own terms on December 31, 1976. Former Public Resources Code § 27650. The Act declared that the coastal zone is a "distinct and valuable natural resource," that it exists as a "delicately balanced ecosystem," and that "the permanent protection of the remaining natural and scenic resources of the coastal zone is a paramount concern to present and future residents of the state and nation." Former Public Resources Code § 27001. In upholding the constitutionality of the 1972 Act, the Court of Appeal commented on these findings by the People, and added its own pertinent observations:

> "Not only are these legislative findings and declarations entitled to great weight (citations omitted), they are largely matters of common knowledge, fully documented by governmental studies. (Fn. omitted). 'The

deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer.' (*Selby Realty Co. v. City of San Buenaventura,* 10 Cal.3d 110, 120.) This is particularly true of our 1,000 mile coastline. Visual, as well as physical, access to large segments of our beaches has been obstructed by residential, commercial and industrial development. Dredging and filling of lagoons and estuaries for boat marinas to promote residential development of adjacent lands have destroyed salt water marshes which have provided homes for birds, plants and animal life unique to the California Coastal Zone. Disposal of sewage and industrial and agricultural waste into the ocean has resulted in the extinction of many plant and sea life causing an imbalance in the delicate coastal ecosystem. Excessive onshore development has resulted in erosion of the shoreline and remedial actions in the form of construction of groins and revetments have affected ocean currents causing erosion elsewhere.

"More than three-fourths of California's 20,000,000 population live within an hour's drive of the Pacific Ocean. Each year thousands of people are turned away from coastal state parks and campgrounds because of inadequate facilities.

"Resolution of the environmental and ecological problems arising out of the competing and conflicting demands made upon the use and enjoyment of the California shoreline has proven to be beyond the capabilities of local governmental agencies. The present coastal land allocation system has failed to protect the public interest." *CEEED v. California Coastal Zone Conservation Commission* (1974) 43 Cal.App.3d 306, 321-322.

Because "[t]he present coastal land allocation system ha[d] failed to protect the public interest," the 1972 Act

established the six regional commissions and the California Coastal Zone Conservation Commission and charged them with the primary duty of preparing a Coastal Plan for submission to the Governor, the Legislature and the People, a Plan designed to ensure the "maintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values." Former Public Resources Code § 27302.

The Act also established the permit system, under which any person who wished to perform a development within the coastal permit area was required to obtain a permit from the appropriate regional commission. Former Public Resources Code §§ 27400-27405. "Thus, the requirement for a permit [was] an interim measure to assure that developments in the coastal zone [were] consistent with the objectives of the Act so that priceless coastal resources [were] not irreversibly committed to uses which would be inconsistent with the plan ultimately developed." *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 253.

It is in this context that the propriety of the state commission's action on the appellant's permit application must be judged; the commission's action can only be viewed as an integral part of an interim and comprehensive statewide effort to plan for the future of California's shoreline.

As noted above, the state commission denied the permit application on an alternative ground completely separate from any possibility of acquisition: it concluded that "[e]ven if the Commission's planning process were to determine the acquisition is not desirable, it is too early in the planning process to decide that development should proceed in the manner proposed by applicant." Juris. St. App., A-4 (emphasis omitted). The state commission's denial of the permit on this independent ground does not raise the

"inequitable precondemnation activities" argued by the appellant as the basis for her appeal. The Court of Appeal recognized this separate ground, and stated:

> "Briggs' contentions also ignore the fact that the State Commission's denial of her permit was based on grounds totally independent of the Department's interest in purchasing her property. The [trial] court so found and the record indicates that the State Commission's denial was also based on: 1) the need for preserving its planning options as to coastal parks, independent of the purchase; and 2) in the absence of acquisition to consider the effect of Briggs' entire plan on the development of the area. Both of these were proper and consistent with the statutory mandate of the 'permanent protection' of the remaining natural and scenic resources of the coastal area and preserving its amenities and aesthetic values . . . .
>
> "Thus . . . the permit denial was based on several independent reasons and, therefore, could not provide a basis for the inverse condemnation judgment."
>
> . . . .
>
> "The State Commission's denial of the permit for reasons independent of the Department's acquisitory interest are beyond attack . . . and do not, as a matter of law, support the trial court's conclusion of inverse condemnation." Juris. St. App., A-15, A-16, A-17.

The propriety of a temporary land use regulatory measure pending adoption of a comprehensive land use plan has long been established. In *Miller v. Board of Public Works,* 195 Cal. 477 (1925), the Court upheld an interim prohibition against the construction of certain types of residences, on the ground that the city was contemplating a comprehensive zoning plan covering the entire city. The Court held that a zoning plan of the extent contemplated would take considerable time to develop, and that it would be destructive

of the plan ultimately adopted if, "during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan." 195 Cal. at 496. This Court subsequently dismissed an appeal from the California Supreme Court's judgment. 273 U. S. 781 (1926).

More recently, the California Supreme Court upheld a City's initiative measure establishing a temporary two-year freeze on any modification of existing zoning regulations, pending comprehensive study of the impact of further development. *Builders Association of Santa Clara-Santa Cruz Counties v. Superior Court,* 13 Cal.3d 225 (1975). This Court dismissed an appeal from the judgment for want of a substantial federal question. 427 U.S. 901 (1976). Other state courts have also consistently upheld similar interim or "stopgap" ordinances. See Rathkopf, *The Law of Zoning and Planning,* ch. 11 (1979 ed.).

The same principles have impelled the California courts to uphold actions by the coastal commissions denying applications for permits, under the interim scheme of regulation established by the 1972 Coastal Act. E. g., *State of California v. Superior Court (Veta),* 12 Cal.3d 237 (1974); *Patterson v. Central Coast Commission,* 58 Cal.App.3d 833 (1976); *Davis v. California Coastal Zone Conservation Commission* 57 Cal.App.3d 700 (1976); *Reed v. California Coastal Zone Conservation Commission,* 55 Cal.App.3d 889 (1975); *CEEED v. California Coastal Zone Conservation Commission, supra,* 43 Cal.App.3d 306; see also *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission,* 11 Cal.App.3d 557 (1970).

Under these cases, the state commission could properly deny the appellant's permit application during the interim

period of regulation established by the 1972 Coastal Act, and pending development and adoption of the comprehensive plan for the future of the California coast. As noted, the permit denial in this case was based on grounds completely apart from any possibility of public purchase of the appellant's property: the permit denial on those grounds therefore does not raise any question whatsoever of "inequitable governmental precondemnation activities . . . ." The California Court of Appeal explicitly concluded that the denial on this independent ground was authorized by the 1972 Coastal Act. Juris. St. App., A-15 and A-16. For these reasons, appellees respectfully submit that the judgment of the Court of Appeal rests on an adequate and independent nonfederal ground, not involving the questions raised by the appellant, and that the appellant's appeal should therefore be dismissed for want of jurisdiction.

IV.

THE APPEAL DOES NOT RAISE EITHER A PROPERLY PRESENTED OR A SUBSTANTIAL FEDERAL QUESTION.

As noted above, the appellant asserts that the Court should hear this appeal, since it involves "inequitable governmental precondemnation activities [which] effect a de facto taking of property slated for condemnation . . ." Juris. St. 21. Even assuming that the judgment does not rest on independent grounds not involving that issue, this case does not properly present the questions suggested by the appellant. For that reason, we do not discuss the alleged conflict in the cases cited by the appellant. In addition, the appeal does not raise a substantial federal question.

1. The appellant continually asserts that at all relevant times the State of California had an "announced and widely

publicized intention to acquire the subject property for a beach park . . ." Juris. St. 17. As previously mentioned, however, the State did not and could not determine to purchase the property until September 27, 1976, when the State Public Works Board authorized its acquisition. Juris. St. App., A-9, A-19, A-20. As the California Court of Appeal noted, "[t]he record indicates that the State Public Works Board condemnation resolution was not passed until three years after the State [Coastal] Commission's denial of the permit." Juris. St. App., A-19 n. 8. The actions of the State therefore occurred at a time when the State was engaged in its comprehensive planning process for the California coastline, and at a time when several agencies had expressed some interest in possible purchase, but *not* at a time when the State had firmly and finally determined to purchase the appellant's property.

2. When the state coastal commission denied the appellant's permit application, the interim period of Coastal Act regulation had barely begun, and the commissions were at the very beginning of their interim planning process. That planning process was subsequently completed within statutory time limits, and included a recommendation for the purchase of the appellant's property by the State of California; during the period while the California Coastal Plan was in preparation, the California Department of Parks and Recreation contemporaneously was also considering the possible purchase of the property. The State Public Works Board considered the recommendations of both agencies, and in fact determined to utilize the State's power of eminent domain for that purchase. The condemnation action was filed, and is now pending. Juris. St. App., A-10. This case therefore does not involve a situation in which the State constantly changed its mind; it does not involve a

situation where the State vacillated in its planning process, or failed to carry out the recommendations resulting from that process.

3. Even the appellant recognized at the time of the coastal commission's actions that the State of California had not determined to purchase her property. Her counsel testified to the state commission during its administrative proceedings that he "wrote to the State Parks and Recreation Department and was told that it did not have any intention of acquiring the property." Def. Ex. 6, p. 17. The findings of the state commission, moreover, explicitly state that "[a]though the State Parks Department does not have a definite commitment to purchase the property, there is clearly a need for preserving the Commission's planning options as to coastal parks in this area." Juris. St. App., A-4.

4. Although the trial court did phrase many of its findings with regard to the administrative actions involved in this case in terms of the State's "intent" to purchase the appellant's property, the appellee has consistently contended in the California courts, and would so contend here, that those findings, as well as others, are either legally inadequate to sustain the judgment or without sufficient evidentiary support. The appellee's opening brief in the Court of Appeal devoted all or part of twenty-nine pages to these questions alone. The California Court of Appeal recognized the validity of the appellee's contentions, since it declared that it would not "discuss the errors in the findings and conclusions or the insufficiency of the evidence unless pertinent to our disposition of the appeal." Juris. St. App., A-3 n. 1. In the course of its opinion, the Court squarely held that some of the trial court's findings on which the appellant even now explicitly relies were not

supported by the evidence.[11] That the appellant continues to urge the trial court's findings in support of her case, notwithstanding the recognition by the Court of Appeal of their lack of evidentiary foundation, is reason enough by itself for this Court to decline review. *Southern Power Company v. North Carolina Public Service Company,* 263 U.S. 508 (1924) (certiorari dismissed where factual dispute on question whether "evidence sufficed to established actual dedication of petitioner's property to public use . . .").

5. Finally, the interim scheme of regulation established by the 1972 Coastal Act is no longer effective. The California Coastal Act of 1976 (Public Resources Code §§ 30000 et seq.), enacted by the California Legislature after consideration of the Coastal Plan, contains no provision which now authorizes a denial of a permit on the ground that the property should be considered in a comprehensive plan for possible public acquisition. Indeed, the 1976 Act contains legislative direction to the contrary. Public Resources Code section 30604(e) now provides:

> "No coastal development permit may be denied under this division on the grounds that a public agency is planning or contemplating to acquire the property on, or property adjacent to the property on, which the proposed development is to be located, unless the public agency has been specifically authorized to acquire

11. The appellant suggests, for example, that the Director of the Department of Parks and Recreation represented that "as soon as the voters adopted [the] State Beach Park Recreation and Historical Facilities Bond Act of 1974, Appellant's property would be promptly acquired . . . but no good faith attempt was made to acquire the subject property by purchase . . . ." Juris. St. 16 n. 11. There is absolutely no finding whatsoever of the trial court which concludes that the State failed to make a good faith effort to acquire the property by purchase. The Court of Appeal did hold, however, that the "findings that the passage of the bond issue was the only condition to the state's acquisition and that all other steps were mere procedural formalities is not supported by the evidence." Juris. St. App., A-6 n. 4.

> such property and there are funds available, or funds which could reasonably be expected to be made available within one year, for such acquisition. If a permit has been denied for such reason and the property has not been acquired by a public agency within a reasonable period of time, a permit may not be denied for such development on grounds that such property or adjacent property is to be acquired by a public agency when the application for such a development is resubmitted."

The expiration of the 1972 Act and the enactment of a new statutory provision which precludes similar future action by the coastal commissions strongly counsels against review by the Court in this case. *Rice v. Sioux City Cemetery,* 349 U.S. 70 (1955).

This case thus involves interim regulation designed to provide temporary protection for significant natural resources, while a state agency prepared, for legislative consideration, a comprehensive plan for the permanent protection of those resources. It also involves a denial of a permit application under that interim regulatory measure, in part on the ground that the property involved should be considered as a recommendation for public purchase as part of that comprehensive plan. The constitutional issues raised by these facts have been consistently answered by the California courts, and do not raise substantial federal questions.

A. In *State of California v. Superior Court (Veta), supra,* 12 Cal.3d 237, the developer's application was denied, in part on the ground of possible public purchase. The Court rejected a claim of inverse condemnation:

> "[D]enial of a building permit to Veta on the ground that the land it proposes to develop may ultimately be

> designated for public use in the coastal zone plan . . . does not amount at this time to a taking of property for public use without compensation." 12 Cal.3d at 255.

B. In *CEEED v. California Coastal Zone Conservation Commission, supra,* 43 Cal.App.3d 306, the Court reiterated the *Veta* holding, and concluded that a denial of a permit so that the land could be maintained undeveloped for the interim period of the 1972 Act pending consideration of possible acquisition did not constitute inverse condemnation. 43 Cal.App.3d at 324-325.

C. In *Patterson v. Central Coast Commission, supra,* 58 Cal.App.3d 833, the Regional Commission denied a permit, on the ground that the property was highly appropriate for public beach purposes and should therefore be considered for public purchase as part of the Coastal Plan. The Court of Appeal upheld the decision, and reversed a judgment directing the issuance of the permit:

> ". . . [T]he record shows that the city and respondent recognized the potential recreational value of the property, and public acquisition had been rejected only for lack of funds, not lack of interest . . . .
>
> "Respondent's proposed development would commit the land to private residences for the foreseeable future. The policy expressed in the Act includes protection and preservation of the remaining natural and scenic resources of the coastal zone . . . . While the effect of the scheme may be to prohibit much, or even most development within the coastal zone during the interim permit period, we reiterate that this is a legitimate exercise of the police power." 58 Cal.App.3d at 849-850.

D. The same result was also reached in *People v. Superior Court (Tidwell),* 91 Cal.App.3d 95 (1979).

These cases are clearly correct. Indeed, the Fourth Circuit recently dismissed on appeal involving these same questions, on the ground that the appeal did not raise any federal question, and this Court thereafter denied certiorari. *Donohoe Construction Co. v. Montgomery County Council,* 567 F.2d 603 (4th Cir. 1977), cert. den. 438 U.S. 905 (1978). For these reasons, we respectfully submit that the appeal must be dismissed, on the grounds that it fails to raise either a properly presented or a substantial federal question.

V.

THE APPELLANT'S "SPECIAL REQUEST FOR RELIEF" SHOULD BE DENIED.

Finally, the appellant suggests that the Court of Appeal opinion "was disposed of below on the authority of *Agins v. City of Tiburon,* 24 Cal.3d 266 . . . which is now pending before this Court." Juris. St. 10. The appellant therefore urges if *Agins* is reversed, the trial court's judgment in this case should be reinstated. That request should be denied for two separate reasons.

First, the appellant's claim substantially misstates the Court of Appeal's opinion.[12] After stating the facts of the

12. The appellant also misstates the opinion in suggesting that "[p]urporting to apply the California Supreme Court's opinion in *Agins,* the court below ruled that Appellant could not seek just compensation when she was completely stripped of her property rights, because her supposed 'remedy' was an action for non-monetary relief which . . . could only be brought some 1½ years before her cause of action accrued . . . ." Juris. St. 20. The Court of Appeal's discussion was directed to the portion of the trial court judgment which had awarded $469,300 in damages to the appellant based *solely* on the permit denial. Juris. St. Am., A-10 and A-11. The Court did not rely on *Agins* for other than that purpose. Her cause of action for damages based on the permit denial accrued at the time of the administrative action; the appellant consistently contended in her briefs before the trial court that she was entitled to damages based solely on that action.

case (Juris. St. App., A-1 to A-11), the Court held that the state commission could properly deny a permit during the interim period of the 1972 Coastal Act, in order to determine whether the property should be recommended for public purchase as part of the Coastal Plan. Juris. St. App., A-11 to A-14. The Court of Appeal further held that the appellant's "contentions ignore the fact that the State Commission's denial of her permit was based on grounds totally independent of the Department's interest in purchasing her property." Juris. St. App., A-15. As a third alternative ground for its decision, the Court of Appeal concluded that even if the denial of the permit was constitutionally impermissible, *Agins* specified that the appropriate remedy was invalidation of the administrative action, rather than an award of damages. Juris. St. App., A-14 to A-15. Thus, the judgment below clearly was *not* based solely on the authority of *Agins.*

Under these circumstances, the appellant's request is improper. Even if *Agins* is reversed, the opinion could not compel reversal of the judgment in this case, since the Court of Appeal properly concluded that no "taking" in fact occurred.

Secondly, as noted above, the appellee contends that most of the critical factual findings upon which the appellant's case must rest are unsupported by substantial evidence. The Court of Appeal agreed, but indicated that it did not need to "discuss the errors in the findings and conclusions or the insufficiency of the evidence unless pertinent to our disposition of the appeal." Juris. St. App., A-3 n. 1. The appellee believes that those factual challenges alone require reversal of the trial court's judgment. Reinstatement of the judgment would thus deprive the appellee of an opportunity to have those factual challenges more fully analyzed by the California Court of Appeal.

CONCLUSION

For the reasons expressed above, the appeal should be dismissed for lack of jurisdiction. Jurisdiction does not lie under 28 U. S. C. § 1257(2), and the judgment of the Court of Appeal rests on a substantial and independent nonfederal ground not involving the questions argued by the appellant. Moreover, the appeal does not raise either a properly presented or a substantial federal question.

Treating the papers upon which the appeal has been taken as a petition for a writ of certiorari under 28 U. S. C. § 2103, certiorari should be denied. If the Court determines that it has jurisdiction over the appeal, the judgment of the California Court of Appeal should be affirmed without further argument.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General of California

ROBERT L. BERGMAN
N. GREGORY TAYLOR
Assistant Attorneys General

RICHARD C. JACOBS
CHRISTOPHER M. AMES
Deputy Attorneys General

By RICHARD C. JACOBS
Deputy Attorney General

Attorneys for Appellee
State of California

(Appendices Follow)

APPENDICES

Appendix A

California Coastal Zone Conservation Act of 1972

(California Public Resources Code)

27000. This division may be cited as the California Coastal Zone Conservation Act of 1972.

27001. The people of the State of California hereby find and declare that the California coastal zone is a distinct and valuable natural resource belonging to all the people and existing as a delicately balanced ecosystem; that the permanent protection of the remaining natural and scenic resources of the coastal zone is a paramount concern to present and future residents of the state and nation; that in order to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to preserve the ecological balance of the coastal zone and prevent its further deterioration and destruction; that it is the policy of the state to preserve, protect, and, where possible, to restore the resources of the coastal zone for the enjoyment of the current and succeeding generations; and that to protect the coastal zone it is necessary:

(a) To study the coastal zone to determine the ecological planning principles and assumptions needed to ensure conservation of coastal zone resources.

(b) To prepare, based upon such study and in full consultation with all affected governmental agencies, private interests, and the general public, a comprehensive, coordinated, enforceable plan for the orderly, long-range conservation and management of the natural resources of the coastal zone, to be known as the California Coastal Zone Conservation Plan.

(c) To ensure that any development which occurs in the permit area during the study and planning period will be consistent with the objectives of this division.

(d) To create the California Coastal Zone Conservation Commission, and six regional coastal zone conservation commissions, to implement the provisions of this division.

CHAPTER 2. DEFINITIONS

27100. "Coastal zone" means that land and water area of the State of California from the border of the State of Oregon to the border of the Republic of Mexico, extending seaward to the outer limit of the state jurisdiction, including all islands within the jurisdiction of the state, and extending inland to the highest elevation of the nearest coastal mountain range, except that in Los Angeles, Orange, and San Diego Counties, the inland boundary of the coastal zone shall be the highest elevation of the nearest coastal mountain range or five miles from the mean high tide line, whichever is the shorter distance.

27101. "Coastal zone plan" means the California Coastal Zone Conservation Plan.

27102. (a) "Commission" means the California coastal zone conservation commission.

(b) "Regional commission" means any regional coastal zone conservation commission.

27103. "Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision of land pursuant to the Subdivision Man Act and any other division of land, including

lot splits; change in the intensity of use of water, ecology related thereto, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility, and the removal or logging of major vegetation. As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphan, aqueduct, telephone line, and electrical power transmission and distribution line.

27104. "Permit area" means that portion of the coastal zone lying between the seaward limit of the jurisdiction of the state and 1,000 yards landward from the mean high tide line of the sea subject to the following provisions:

(a) The area of jurisdiction of the San Francisco Bay Conservation and Development Commission is excluded.

(b) If any portion of any body of water which is not subject to tidal action lies within the permit area, the body of water together with a strip of land 1,000-feet wide surrounding it shall be included.

(c) Any urban land area which is (1) a residential area zoned, stabilized and developed to a density of four or more dwelling units per acre on or before January 1, 1972; or (2) a commercial or industrial area zoned, developed, and stabilized for such use on or before January 1, 1972, may, after public hearing, be excluded by the regional commission at the request of a city or county within which such area is located. An urban land area is "stabilized" if 80 percent of the lots are built upon to the maximum density or intensity of use permitted by the applicable zoning regulations existing on January 1, 1972.

Tidal and submerged lands, beaches, and lots immediately adjacent to the inland extent of any beach or of the mean high tide line where there is no beach shall not be excluded.

Orders granting such exclusion shall be subject to conditions which shall assure that no significant change in density, height, or nature of uses occurs.

An order granting exclusion may be revoked at any time by the regional commission, after public hearing.

(d) Each regional commission shall adopt a map delineating the precise boundaries of the permit area within 60 days after its first meeting and file a copy of such map in the office of the county clerk of each county within its region.

27105. "Person" includes any individual, organization, partnership, and corporation, including any utility and any agency of federal, state, and local government.

27106. "Sea" means the Pacific Ocean and all the harbors, bays, channels, estuaries, salt marshes, sloughs, and other areas subject to tidal action through a connection with the Pacific Ocean, excluding nonestuarine rivers and creeks.

CHAPTER 3. CREATION, MEMBERSHIP, AND POWERS OF COMMISSION AND REGIONAL COMMISSIONS

Article 1. Creation and Membership of Commissions and Regional Commissions

27200. The California Coastal Zone Conservation Commission is hereby created and shall consist of the following members:

(a) Six representatives from the regional commissions, selected by each regional commission from among its members.

(b) Six representatives of the public who shall not be members of a regional commission.

27201. The following six regional commissions are hereby created.

(a) The North Coast Regional Commission for Del Norte, Humboldt, and Mendocino Counties shall consist of the following members:

(1) One supervisor and one city councilman from each county.

(2) Six representatives of the public.

(b) The North Central Coast Regional Commission for Sonoma, Marin, and San Francisco Counties shall consist of the following members:

(1) One supervisor and one city councilman from Sonoma County and Marin County.

(2) Two supervisors of the City and County of San Francisco.

(3) One delegate to the Association of Bay Area Governments.

(4) Seven representatives of the public.

(c) The Central Coast Regional Commission for San Mateo, Santa Cruz, and Monterey Counties shall consist of the following members:

(1) One supervisor and one city councilman from each county.

(2) One delegate to the Association of Bay Area Governments.

(3) One delegate to the Association of Monterey Bay Area Governments.

(4) Eight representatives of the public.

(d) The South Central Coast Regional Commission for San Luis Obispo, Santa Barbara, and Ventura Counties shall consist of the following members:

(1) One supervisor and one city councilman from each county.

(2) Six representatives of the public.

(e) The South Coast Regional Commission for Los Angeles and Orange Counties shall consist of the following members:

(1) One supervisor from each county.

(2) One city councilman from the City of Los Angeles selected by the president of such city council.

(3) One city councilman from Los Angeles County from a city other than Los Angeles.

(4) One city councilman from Orange County.

(5) One delegate to the Southern California Association of Governments.

(6) Six representatives of the public.

(f) The San Diego Coast Regional Commission for San Diego County shall consist of the following members:

(1) Two supervisors from San Diego County and two city councilmen from San Diego County, at least one of whom shall be from a city which lies within the permit area.

(2) One city councilman from the City of San Diego, selected by the city council of such city.

(3) One member of the San Diego Comprehensive Planning Organization.

(4) Six representatives of the public.

27202. All members of the regional commissions and public members of the commission shall be selected or appointed as follows:

(a) All supervisors, by the board of supervisors on which they sit;

(b) All city councilmen except under subsections (e) (2) and (f) (2), by the city selection committee of their respective counties;

(c) All delegates of regional agencies, by their respective agency;

(d) All public representatives, equally by the Governor, the Senate Rules Committee and the Speaker of the Assembly, provided that the extra member under (b) (4) and the extra members under (c) (4) shall be appointed by the Governor, the Senate Rules Committee and the Speaker of the Assembly respectively.

Article 2. Organization

27220. Each public member of the commission or of a regional commission shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information, to appraise resource uses in light of the policies set forth in this division, to be responsive to the scientific, social, esthetic, recreational, and cultural needs of the state. Expertise in conservation, recreation, ecological and physical sciences, planning, and education shall be represented on the commission and regional commissions.

27221. Each member of the commission and each regional commission shall be appointed or selected not later than December 31, 1972.

Each appointee of the Governor shall be subject to confirmation by the Senate.

27222. In the case of persons qualified for membership because they hold a specified office, such membership ceases when their term of office ceases. Vacancies which occur shall be filled in the same manner in which the original member was selected or appointed.

27223. Members shall serve without compensation, but shall be reimbursed for the actual and necessary expenses incurred in the performance of their duties to the extent that reimbursement is not otherwise provided by another

public agency. Members who are not employees of other public agencies shall receive fifty dollars ($50) for each full day of attending meetings of the commission or of any regional commission.

27224. The commission and regional commissions shall meet no less than once a month at a place convenient to the public. Unless otherwise provided in this division, no decision on permit applications or on the adoption of the coastal zone plan or any part thereof shall be made without a prior public hearing. All meetings of the commission and each regional commission shall be open to the public. A majority affirmative vote of the total authorized membership shall be necessary to approve any action required or permitted by this division, unless otherwise provided.

27225. The first meeting of the commission shall be no later than February 15, 1973. The first meeting of the regional commissions shall be no later than February 1, 1973.

27226. The headquarters of the commission shall be within the coastal zone.

Article 2.5. Conflicts of Intereset

27230. Except as hereinafter provided none of the following persons shall appear or act, in any capacity whatsoever except as a representative of the state, or political subdivision thereof, in connection with any proceeding, hearing, application, request for ruling or other official determination, judicial or otherwise, in which the coastal zone plan, or the commission or any regional commission is involved in an official capacity:

(a) Any member or employee of the commission or regional commission;

(b) Any former member or employee of the commission or regional commission during the year following termination of such membership or employment;

(c) Any partner, employer, an employee of a member or employee of the commission or any regional commission, when the matter in issue is one which is under the official responsibility of such member or employee, or in connection with which such member or employee has acted or is scheduled to act, in any official capacity whatsoever.

27231. No member or employee of the commission or any regional commission shall participate, in any official capacity whatsoever, in any proceeding, hearing, application, request for ruling or other official determination, judicial or otherwise, in which any of the following has a financial interest: the member or employee himself; his spouse; his child; his partner; any organization in which he is then serving or has, within two years prior to his selection or appointment to or employment by such commission or regional commission, served, in the capacity of officer, director, trustee, partner, employer or employee; any organization within which he is negotiating for or has any arrangement or understanding, concerning prospective partnership or employment.

27232. In any case within the coverage of Section 27230, the prohibitions therein contained shall not apply if the person concerned advises the commission in advance of the nature and circumstances thereof including full public disclosure of the facts which may potentially give rise to a violation of this article, and obtains from the commission a written determination that the contemplated action will not adversely affect the integrity of the commission or any regional commission. Any such determination shall require the affirmative vote of two-thirds of the members of the commission.

27233. Nothing in this article shall preclude any member of the commission or any regional commission, who is also a county supervisor or city councilman, from voting or otherwise acting upon a matter he has previously acted upon in such designated capacity.

27234. Any person who violates any provision of this article, shall upon conviction, and for each such offense, be subject to a fine of not more than ten thousand dollars ($10,000) or imprisonment in the state prison for not more than two years, or both.

Article 3. POWERS AND DUTIES

27240. The commission and each regional commission, may:

(a) Accept grants, contributions, and appropriations;

(b) Contract for any professional services if such work or services cannot satisfactorily be performed by its employees;

(c) Be sued and sue to obtain any remedy to restrain violations of this division. Upon request of the commission or any regional commission, the State Attorney General shall provide necessary legal representation.

(d) Adopt any regulations or take any action it deems reasonable and necessary to carry out the provisions of this division, but no regulations shall be adopted without a prior public hearing.

27241. The commission and regional commissions may request and utilize the advice and services of all federal, state, and local agencies. Upon request of a regional commission any federally recognized regional planning agency within its region shall provide staff assistance insofar as its resources permit.

27242. All elements of the California Comprehensive Ocean Area Plan, together with all staff and funds appropriate or allocated to it, shall be delivered by the Governor and shall be attached and allocated to the commission at its first meeting.

27243. The commission and each regional commission shall each elect a chairman and appoint an executive director, who shall be exempt from civil service.

CHAPTER 4. CALIFORNIA COASTAL ZONE CONSERVATION PLAN

Article 1. Generally

27300. This commission shall prepare, adopt, and submit to the Legislature for implementation the California Coastal Zone Conservation Plan.

27301. The coastal zone plan shall be based upon detailed studies of all the factors that significantly affect the coastal zone.

27302. The coastal zone plan shall be consistent with all of the following objectives:

(a) The maintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values.

(b) The continued existence of optimum populations of all species of living organisms.

(c) The orderly, balanced utilization and preservation, consistent with sound conservation principles, of all living and nonliving coastal zone resources.

(d) Avoidance of irreversible and irretrievable commitments of coastal zone resources.

27303. The coastal zone plan shall consist of such maps, text and statements of policies and objectives as the commission determines are necessary.

27304. The plan shall contain at least the following specific components:

(a) A precise, comprehensive definition of the public interest in the coastal zone.

(b) Ecological planning principles and assumptions to be used in determining the suitability and extent of allowable development.

(c) A component which includes the following elements:

(1) A land-use element.

(2) A transportation element.

(3) A conservation element for the preservation and management of the scenic and other natural resources of the coastal zone.

(4) A public access element for maximum visual and physical use and enjoyment of the coastal zone by the public.

(5) A recreation element.

(6) A public services and facilities element for the general location, scale, and provision in the least environmentally destructive manner of public services and facilities in the coastal zone. This element shall include a power plant siting study.

(7) An ocean mineral and living resources element.

(8) A population element for the establishment of maximum desirable population densities.

(9) An educational or scientific use element.

(d) Reservations of land or water in the coastal zone for certain uses, or the prohibition of certain uses in specific areas.

(e) Recommendations for the governmental policies and powers required to implement the coastal zone plan including the organization and authority of the governmental agency or agencies which should assume permanent responsibility for its implementation.

Article 2. Planning Procedure

27320. (a) The commission shall, within six months after its first meeting, publish objectives, guidelines, and criteria for the collection of data, the conduct of studies, and the preparation of local and regional recommendations for the coastal zone plan.

(b) Each regional commission shall, in cooperation with appropriate local agencies, prepare its definitive conclusions and recommendations, including recommendations for areas that should be reserved for specific uses or within which specific uses should be prohibited, which it shall, after public hearing in each county within its region, adopt and submit to the commission no later than April 1, 1975.

(c) On or before December 1, 1975, the commission shall adopt the coastal zone plan and submit it to the Legislature for its adoption and implementation.

CHAPTER 5. INTERIM PERMIT CONTROL

Article 1. General Provisions

27400. On or after February 1, 1973, any person wishing to perform any development within the permit area shall obtain a permit authorizing such development from the regional commission and, if required by law, from any city, county, state, regional or local agency.

Except as provided in Sections 27401 and 27422, no permit shall be issued without the affirmative vote of a majority of the total authorized membership of the regional commission, or of the commission on appeal.

27401. No permit shall be issued for any of the following without the affirmative vote of two-thirds of the total authorized membership of the regional commission, or of the commission on appeal:

(a) Dredging, filling, or otherwise altering any bay, estuary, salt marsh, river mouth, slough, or lagoon.

(b) Any development which would reduce the size of any beach or other area usable for public recreation.

(c) Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches and the mean high tideline where there is no beach.

(d) Any development which would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast.

(e) Any development which would adversely affect water quality, existing areas of open water free of visible structures, existing and potential commercial and sport fisheries, or agricultural uses of land which are existing on the effective date of this division.

27402. No permit shall be issued unless the regional commission has first found, both of the following:

(a) That the development will not have any substantial adverse environmental or ecological effect.

(b) That the development is consistent with the findings and declarations set forth in Sections 27001 and with the objectives set forth in Section 27302.

The applicant shall have the burden of proof on all issues.

27403. All permits shall be subject to reasonable terms and conditions in order to ensure:

(a) Access to publicly owned or used beaches, recreation areas, and naturel reserves is increased to the max'mum extent possible by appropriate dedication.

(b) Adequate and properly located public recreation areas and wildlife preserves are reserved.

(c) Provisions are made for solid and liquid waste treatment, disposition, and management which will min'mize adverse effects upon coastal zone resources.

(d) Alterations to existing land forms and vegetation, and construction of structures shall cause minimum adverse effect to scenic resources and minimum danger of floods, landslides, erosion, siltation, or failure in the event of earthquake.

27404. If, prior to the effective date of this division, any city or county has issued a building permit, no person who has obtained a vested right thereunder shall be required to secure a permit from the regional commission; providing that no substantial changes may be made in any such development, except in accordance with the provisions of this division. Any such person shall be deemed to have such vested rights, if prior to April 1, 1972, he has in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor. Expenses incurred in obtaining the enactment of an ordinance in relation to the particular development or the issuance of a permit shall not be deemed liabilities for work or material.

27405. Notwithstanding any provision in this chapter to the contrary, no permit shall be required for the following types of development:

(a) Repairs and improvements not in excess of seven thousand five hundred dollars ($7,500) to existing single-family residences; provided, that the commission shall specify by regulation those classes of development which involve a risk of adverse environmental effect and may require that a permit be obtained.

(b) Maintenance dredging of existing navigation channels or moving dredged material from such channels to a disposal area outside the permit area, pursuant to a permit from the United States Army Corps of Engineers.

Article 2. Permit Procedure

27420. (a) The commission shall prescribe the procedures for permit applications and their appeal and may require a reasonable filing fee and the reimbursement of expenses.

(b) The regional commission shall give written public notice of the nature of the proposed development and of the time and place of the public hearing. Such hearing shall be set no less than 21 nor more than 90 days after the date on which the application is filed.

(c) The regional commission shall act upon an application for permit within 60 days after the conclusion of the hearing and such action shall become final after the tenth working day unless an appeal is filed within that time.

27421. Each unit of local government within the permit area shall send a duplicate of each application for a development within the permit area to the regional commission at the time such application for a local permit is filed, and shall advise the regional commission of the granting of any such permit.

27422. The commission shall provide, by regulation, for the issuance of permits by the executive directors without compliance with the procedure specified in this chapter in cases of emergency or for repairs or improvements to existing structures not in excess of twenty-five thousand dollars ($25,000) and other developments not in excess of ten thousand dollars ($10,000). Nonemergency permits shall not be effective until after reasonable public notice and adequate time for the review of such issuance has been provided. If any two members of the regional commission so request at the first meeting following the issuance of such permit, such issuance shall not be effective and instead the application shall be set for a public hearing pursuant to the provisions of Section 27420.

27423. (a) An applicant, or any person aggrieved by approval of a permit by the regional commission may appeal to the commission.

(b) The commission may affirm, reverse, or modify the decision of the regional commission. If the commission fails to act within 60 days after notice of appeal has been filed, the regional commission's decision shall become final.

(c) The commission may decline to hear appeals that it determines raise no substantial issues. Appeals it hears shall be scheduled for a de novo public hearing and shall be decided in the same manner and by the same vote as provided for decisions by the regional commissions.

27424. Any person, including an applicant for a permit, aggrieved by the decision or action of the commission or regional commission shall have a right to judicial review of such decision or action by filing a petition for a writ of candate pursuant to Section 1084 of the Code of Civil Procedure, within 60 days after such decision or action has become final.

27425. Any person may maintain an action for declaratory and equitable relief to restrain violation of this division. No bond shall be required for an action under this section.

27426. Any person may maintain an action for the recovery of civil penalties provided in Sections 27500 and 27501.

27427. The provisions of this article shall be in addition to any other remedies available at law.

27428. Any person who prevails in a civil action brought to enjoin a violation of this division or to recover civil penalties shall be awarded his costs, including reasonable attorneys fees.

CHAPTER 6. PENALTIES

27500. Any person who violates any provision of this division shall be subject to a civil fine not to exceed ten thousand dollars ($10,000).

27501. In addition to any other penalties, any person who performs any development in violation of this division shall be subject to a civil fine not to exceed five hundred dollars ($500) per day for each day in which such violation persists.

CHAPTER 7. REPORTS

27600. (a) The commission shall file annual progress reports with the Governor and the Legislature not later than the fifth calendar day of the 1974 and 1975 Regular Session of the Legislature, and shall file its final report containing the coastal zone plan with the Governor and the Legislature not later than the fifth calendar day of the 1976 Regular Session of the Legislature.

CHAPTER 8. TERMINATION

27650. This division shall remain in effect until the 91st day after the final adjournment of the 1976 Regular Session of the Legislature, and as of that date is repealed.

Sec. 2. Section 11528.2 is added to the Business and Professions Code, to read:

11528.2. The clerk of the governing body or the advisory agency of each city or county or city and county having jurisdiction over any part of the coastal zone as defined in Section 27100 of the Public Resources Code, shall transmit to the office of the California Coastal Zone Conservation Commission within three days after the receipt thereof, one copy of each tentative map of any subdivision located, wholly or partly, within the coastal zone and such Commission may, within 15 days thereafter, make recommendations to the appropriate local agency regarding the effect of the proposed subdivision upon the California Coastal Zone Conservation Plan. This section does not exempt any such subdivision from the permit requirements of Chapter 5 (commencing with Section 27400) of Division 18 of the Public Resources Code.

This section shall remain in effect only until the 91st day after the final adjournment of the 1976 Regular Session of the Legislature, and as of that date is repealed.

Sec. 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Sec. 4. There is hereby appropriated from the Bagley Conservation Fund to the California Coastal Zone Conservation Commission the sum of five million dollars ($5,000,000) to the extent that any moneys are available in such fund and if all or any portions thereof are not available then from the General Fund for expenditure to support the operations of the commission and regional coastal zone conservation commissions during the fiscal years of 1973 to 1976, inclusive, pursuant to the provisions of Division 18 (commencing with Section 27000) of the Public Resources Code.

Sec. 5. The Legislature may, by two-thirds of the membership concurring, amend this act in order to better achieve the objectives set forth in Sections 27001 and 27302 of the Public Resources Code.

Appendix B

Court of Appeal Decision Staying Trial of Eminent Domain Action

Not to be Published in Official Reports

Filed—Nov 17, 1978
Court of Appeal—First App. Dist.
Clifford C. Porter, Clerk

By .....
Deputy

In the Court of Appeal of the State of California
First Appellate District
Division Two

1 Civil No. 44236
(Sup.Ct. No. M-7917)

People of the State of California, etc.,
Petitioner,

v.

Superior Court of the County of Monterey,
Respondent.

Mitzi S. Briggs,
Real Party in Interest.

Petitioner, People of the State of California, acting by and through the State Public Works Board (hereafter State), is the plaintiff in an eminent domain action in which real party in interest, Mitzi S. Briggs (hereafter Briggs),

is defendant. State seeks relief by prerogative writ to compel respondent superior court to vacate its order setting the action for trial. State contends that judgment has already been rendered against State and in favor of Briggs in an inverse condemnation action involving the identical parcel of land which is the subject of the eminent domain action, that the judgment has been appealed by State, and that to proceed with the trial of the eminent domain action while the appeal is pending would be useless litigation, which would require the expenditure of more than a million dollars in trial costs, consume six weeks of trial court time, and compel at least one, if not both of the parties, to take a second appeal.[1]

It appears from the record that two separate actions involving the same parcel of oceanfront land owned by Briggs have been instituted in the Superior Court of Monterey County. In the first action, commenced on August 22, 1975, Briggs, as plaintiff, sought damages from State for inverse condemnation of certain real property consisting of approximately 35.6 acres of undeveloped land located in Monterey County near Carmel on the cost of the Pacific Ocean. A nonjury trial on the issue of liability commenced on January 10, 1977; respondent court determined that State had inversely condemned and damaged Briggs' property.[2] On

1. By directing the issuance of an alternative writ of mandate to be heard before this court, the Supreme Court necessarily determined that there is no adequate remedy in the ordinary course of law and that this case is a proper one for the exercise of original jurisdiction (5 Witkin, Cal. Procedure (2d ed. 1971) p. 3870).

2. After the court had determined the issue of liability, State sought a continuance and on March 24, 1977, State filed a petition for writ of mandate/prohibition in this court (1 Civ. No. 41031, Div. Three) seeking to compel the superior court to vacate its decision, findings of fact and conclusions of law entered in favor of Briggs at the close of the liability phase of the bifurcated trial. That petition was denied on March 25, 1977, and a petition for hearing was denied by the Supreme Court on May 5, 1977.

May 12, 1977, State deposited the sum of $1,750,000 as the probable amount of compensation. A jury, in a trial which commenced on August 29, 1977, rendered a verdict of $3,900,000 as the fair market value of the property on March 27, 1975. Briggs' other claims for damages were bifurcated and tried by the court. Finally, on March 30, 1978, judgment was entered in favor of Briggs and against State in the sum of $6,429,437.48, offset by the sum of $1,750,000 previously deposited as the probable amount of compensation, for a total of $4,679,437.48. Of this sum, $957,002.63 was awarded to Briggs for litigation expenses, including attorney fees. On April 27, 1978, State filed notice of appeal, and on May 8, 1978, Briggs filed notice of cross-appeal. The appeal and cross-appeal are presently pending before this court (1 Civ. No. 44189).[3]

On December 31, 1976, ten days prior to the date trial commenced on the inverse condemnation action, State filed its action against Briggs in eminent domain, seeking to condemn the identical parcel of land for the Carmel River State Beach Project, an extension of the State Park System.[4] On February 10, 1977, shortly after the trial of the liability issues in the inverse condemnation action, Briggs answered and cross-complained. Significantly, the cross-complaint incorporated by reference the complaint filed in the inverse condemnation action and sought damages for the same conduct which was at issue in the inverse condemnation action.

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3. The appellant State was in default for failure to timely designate the record on appeal at the time this petition was filed in our court. State filed application for relief from default on May 22, 1978. Briggs filed opposition on May 30, 1978. On July 6, 1978, this court granted the motion for relief from default with conditions.

4. The State Public Works Board adopted a resolution selecting the site and authorizing acquisition of the real property on September 27, 1976. The Budget Act of 1974 contained an appropriation for acquisition of real property for use of Carmel River State Beach.

On January 17, 1978, Briggs noticed a motion to specially set the eminent domain action for trial. On March 30, 1978, over the objection of State, respondent court granted this motion, and set September 11, 1978, as the trial date for the eminent domain action. On May 9, 1978, State's motion for reconsideration of the order of March 30 was denied.

State contends that no useful purpose could be served by trial of the eminent domain action because the issues raised by the cross-complaint in the eminent domain action are, in large part, identical to those involved in the pending appeal and cross-appeal from the judgment in the inverse condemnation action and may or may not be resolved by the appeal. State argues that if the judgment in the inverse condemnation is *affirmed,* trial of the eminent domain action would have wasted more than six weeks of trial court time and added a million dollars in costs to the parties; a *reversal* of the judgment in the inverse condemnation action would necessitate a subsequent reversal on appeal of any judgment entered in the eminent domain action, since the cross-complaint in that action raises precisely the same issues litigated in the inverse condemnation action.

If, in a prior action between the same parties, a judgment was rendered which, if final, would be *res adjudicata* on some or all of the issues involved in the second action, the trial court in the exercise of a sound discretion may continue the trial of the second action until the final adjudication of an appeal pending from the first judgment (Houghton v. Superior Court (1922) 187 Cal. 661, 666; California C. Mach. Co. v. Superior Court (1935) 3 Cal.2d 606, 609; 4 Witkin, Cal. Procedure (2d ed.) Trial, § 15, p. 2872).

We have determined, under all the circumstances shown to exist in this matter, that respondent court's attempt to proceed with the trial of the eminent domain action while

the appeal on the inverse condemnation judgment is pending was an abuse of discretion. Any recovery in the inverse condemnation action, which proceeded to judgment first, would bar a duplicate award for the same damage in a subsequent eminent domain proceeding (Klopping v. City of Whittier, 8 Cal.3d 39, 58). Since Briggs' cross-complaint in the eminent domain action incorporates by reference the allegations of her inverse condemnation action and seeks damages for the same conduct, a trial of the eminent domain action at this time (if the same procedure is applied, with some issues tried by the jury and other issues by the court) could lead to contradictory decisions or awards relating to the same controversy, to multiple litigation, and to the pyramiding of expenses, such as costs and attorney fees.

Let a peremptory writ of mandate issue commanding respondent court to stay the trial of the eminent domain action until the final determination of the pending appeal from the judgment in the inverse condemnation action.

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Taylor, P.J.

We Concur:

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Kane, J.

.....

Rouse, J.

Supreme Court, U. S.
FILED
JUN 3 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1678

MITZI S. BRIGGS,
Appellant,

VS.

STATE OF CALIFORNIA, etc.,
Appellee.

Appeal from the Court of Appeal of California
First Appellate District, Division Two

RESPONSE TO MOTION TO DISMISS OR AFFIRM

JESS S. JACKSON
180 Park Road
Burlingame, California 94010

GIDEON KANNER
1440 West Ninth Street
Los Angeles, California 90015
Attorneys for Appellant

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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RESPONSE TO MOTION TO DISMISS OR AFFIRM

INTRODUCTION

Appellant has presented her case to this Court on the basis of a pervasive, nationwide constitutional problem, whereby the law on what constitutes a *de facto* Fifth Amendment taking effected by oppressive governmental precondemnation activities, is in a state of total intellectual disarray and at best varies from state to state in a haphazard fashion (see Jurisdictional Statement, pp. 21-31). Appellee's response is to ignore entirely the important

constitutional issue thus presented,[1] and to dwell instead on various minutiae of this single case, premised on the tacit notion that as long as a state court decides (or ignores) an issue, that somehow constitutes an "independent non-federal ground" (Motion to Dismiss, p. 11) even though the State court decision is grossly at variance with federal constitutional law laid down by this Court.[2]

It seems to Appellant that Appellee's argument in this regard was fully answered by Mr. Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290, 298 (1967): ". . . The Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." Here, the State *by the effect of its deeds* took Appellant's property; by undisputed trial court findings[3], the State *completely* stripped Mrs. Briggs of *all* her significant

[1]Please note that Appellee does not quarrel with the importance or incidence of the constitutional issue. Nor does Appellee dispute in the slightest the State and federal law survey presented by Appellant. Appellee simply disclaims the entire topic.

[2]In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-128, this Court outlined factors of special significance whose presence is determinative of a taking. They include: (a) the economic impact on the owner, (b) the owner's reasonable expectations, (c) a state tribunal's *reasonable* conclusion that police power objectives would be promoted by prohibiting a particular contemplated use of land (not as here, a preclusion of all uses to facilitate a future condemnation—see *United States v. Reynolds*, 397 U.S. 14, 16 (1970)), and (d) governmental actions that may be characterized as acquisitions of resources. *All* of these factors are present at bench, and findings to that effect were made by the trial court.

[3]While Appellee disputes *some* of the trial court findings of fact, and myopicly focuses, as did the State Appellate Court, upon the legitimacy of the apparent public *goal*, rather than upon the *effect* of the *improperly motivated* State *activities* (and failures to act), neither here nor below has it ever quarrelled with Findings 45-56 (Jurisdictional Statement, Appendix E, pp. A-42 - A-44). Those Findings were, moreover, made on *undisputed* trial evidence and they conclusively establish the totally confiscatory impact on the subject property.

"sticks in the bundle", leaving her nothing of utility or value, leaving her as a nominal "owner" of bare legal title (and even that subject to a pending but delayed condemnation action and a *lis pendens*), and with the subject property in a tax sale status because nothing—absolutely nothing—can be done with it.

Whether viewed as a vehicle for clarifying a badly confused area of the law, or as a means of doing justice in the face of blatant deprivation of constitutionally protected rights, Appellant respectfully suggests this case commends itself to the Court's attention and amply justifies relief.

I

APPELLEE'S NOTION OF "ADEQUATE NONFEDERAL GROUND" IS TANTAMOUNT TO AN ASSERTION THAT A STATE COURT MAY LITERALLY IGNORE THE U.S. CONSTITUTION

In the case at bench the trial court made extensive findings of federal constitutional violations. Nonetheless the Court of Appeal reversed, purporting to rely on various California statutory provisions. The opinion of the Court of Appeal is remarkable in that it *never even mentions the Constitution.*

The "nonfederal" ground on which the decision below thus rests cannot constitute a threshold disposition, does not even address the controlling federal issues, but is simply conjured out of thin air. The Court of Appeal simply ignored both the trial court findings[4] and Appellant's reli-

[4]In other words, the situation here is the same as in *Nectow v. Cambridge*, 277 U.S. 183 (1926). There the trial court found as a matter of fact that the economic viability of the property in question was destroyed. The Massachusetts appellate court

ance on the Constitution and purported to write a discourse mainly praising the public goals of State statutes governing the procedure for property acquisition and the over-regulation of coastal property planning, which thus come off as somehow so self-evidently superior to the Constitution that the latter does not even warrant a mention. That such an approach disregards the federal supremacy clause (U.S. Const., Art. VI, Cl. 2) seems evident. That the Court of Appeal decision below[5] also violates procedural due process is equally clear. The critical question here is not what the State law says, but whether what it has caused, regardless of the questionable nobility of its purposes, is repugnant to the Constitution. Or as this Court put it in *Chicago B & Q R. Co. v. Chicago*, 166 U.S. 226, 235, the duty to pay just compensation arises under the federal Constitution and cannot be evaded by reliance on state law:

> " 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation.' "

The same is true here.

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reversed, supposedly as a matter of law. This Court, in turn, reversed the latter decision, noting that deprivation of the owner's reasonable investment-backed expectations of some economically viable use of his land was constitutionally impermissible.

In other words, there is no state "law" that can be invoked so as to undo the constitutional guarantee against deprivation of property without due process or its taking without just compensation. The U.S. Constitution forbids it, and it—not some state law—is the supreme law of the land.

[5]Despite the Appellate Court's "one-liner" disclaiming to the contrary, the State did not challenge the substantiality of the evidence at trial, nor did the Appellate Court consider the same. To state otherwise is blatently inaccurate and an attempt to cover up what is otherwise clear on this record.

II

THE DISPOSITIVE TRIAL COURT FINDINGS ARE UNDISPUTED

While Appellee purports to quibble with some of the factual findings made by the trial court, it neither does nor can dispute Findings 45 through 56 (see Jurisd. St. at pp. A-42—A-44), as they were made on the basis of overwhelming, undisputed and unimpeached testimony of several highly knowledgeable witnesses who were unanimous in proving that *all* value, utility and saleability of the subject property were destroyed by Appellee's acts, announcements, and delays. It can no longer be the subject of rational dispute that it is such *factual* determinations, addressed to the specific facts of each individual case, that constitute the test for the presence of a *de facto* taking (*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-124). Thus, those Findings of Fact that establish *without dispute* that *all* significant "sticks in the bundle" that comprise the subject property have been taken from the owner, are the core of what this case is about. Appellee's self-conscious attempt to ignore them speaks for itself.

The ultimate facts found by the trial court (and in no way disputed by the Court of Appeal) are that the subject property was stripped of *all* its value and utility, and this was done ". . . pursuant to a policy to preserve the subject property in its then undeveloped status pending its acquisition" (Finding 56, Jurisdictional Statement, Appendix E, p. A-44). Those Findings are dispositive on the taking

issue[6], because what *this* record presents is a complete and total deprivation of private property rights[7] without just compensation.

CONCLUSION

The Motion to Dismiss is a massive evasion of the Constitutional letter and policy. Appellee simply treats the present appeal as if it were a continuation of state court proceedings, rather than a review of the federal constitutional attributes of this controversy.

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[6]As this Court admonished, the presence of a taking is based on an examination of the *facts* of each case (see e.g. *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-124). The facts found here are that there had occurred a *complete* and *total* deprivation of *all* property rights of value or utility to the owner. *That* should be dispositive, and is in no way affected by the State's assertion that its goals were noble. This Court definitely refused to engage in any such ". . . utilitarian comparison of public benefit and private loss . . ." in *United States Trust v. New Jersey*, 431 U.S. 1, 28-29 (1977), pointedly noting that ". . . a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good . . .".

[7]Appellee asserts (Motion to Dismiss, p. 27, fn.12) that the trial court awarded just compensation for some precondemnation losses and found a constitutional taking based solely on the permit denial to Appellant. With due respect, that is simply not true; the trial court's Conclusions of Law appear as Appendix F to the Jurisdictional Statement (pp. A-45 - A-46). These Conclusions make it clear that the damages in question were awarded because the State ". . . interfered with and blocked Briggs use, development and economic return on the subject property . . ." (Id., p. A-46). In other words, this compensation was for deprivation of the right of user, not for some abstract "permit denial". Note also the State ignores several other State activities including a lawsuit commenced by the State to enjoin Mrs. Briggs' further use, development or sale of her property. Thus this is not a regulation case; nor is it the typical precondemnation activity (or "prelude") case, rather it is one in which the State engaged in several direct legal restraints pending formalization, *de jure*, of its taking for public open space and beach uses.

The entire nation suffers from a pervasive disarray and inconsistency in governing law to constitutionally protect property rights—and thus a chilling effect upon private incentive to work to acquire and hold property, while fashionable (and often lauditory) goals are zealously pursued with questionable means and unconstitutional economic effects. *That* is what this case is primarily all about. This Court's intervention and guidance are urgently needed.

Finally, even on Appellee's unsound premise, its argument fails. However sliced and tortured, *these* facts are that the subject property was *de facto* taken and stripped of *all* value and utility *in 1975*—when the inverse condemnation action accrued. To tell the owner of such land that her sole "remedy" was to sue 1½ years before her cause of action for taking even accrued (and therefore before she could make out a case) is a bizarre flouting of the Constitution and her fundamental individual rights.

Mrs. Briggs respectfully prays that the Motion to Dismiss be denied and probable jurisdiction be noted, or in the alternative that certiorari be granted.

Respectfully submitted,

JESS S. JACKSON
GIDEON KANNER
Attorneys for Appellant